DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-204
Title: Michael Shane Christopher, et al., Petitioners
v.
SmithKline Beecham Corporation, dba GlaxoSmithKline
Docketed: August 17, 2011
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (10-15257)
Decision Date: February 14, 2011
Rehearing Denied: May 17, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 12 2011	Petition for a writ of certiorari filed. (Response due September 16, 2011)
Aug 25 2011	Order extending time to file response to petition to and including October 17, 2011.
Oct 17 2011	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
Oct 17 2011	Brief of respondent SmithKline Beecham Corporation, dba GlaxoSmithKline filed.
Oct 17 2011	Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed.
Oct 31 2011	DISTRIBUTED for Conference of November 22, 2011.
Nov 28 2011	Petition GRANTED.
Jan 5 2012	The time to file the joint appendix and petitioners' brief on the merits is extended to and including January 30, 2012.
Jan 5 2012	The time to file respondent's brief on the merits is extended to and including March 19, 2012.
Jan 12 2012	Consent to the filing of amicus curiae briefs in support of either party or of neither party, received from counsel for the petitioners.
Jan 30 2012	Joint appendix filed. (Statement of costs filed.)
Jan 30 2012	Brief of petitioners Michael Shane Christopher, et al. filed.
Feb 3 2012	SET FOR ARGUMENT ON Monday, April 16, 2012
Feb 6 2012	Brief amicus curiae of the United States filed.
Feb 6 2012	Brief amici curiae of National Employment Lawyers Association, et al. filed. (Distributed)
Feb 6 2012	Brief amici curiae of Pharmaceutical Representatives filed.
Feb 6 2012	Brief amici curiae of Certified Class of Pharmaceutical Representatives from Johnson & Johnson filed.
Feb 6 2012	Brief amici curiae of Medical Professionals filed.
Feb 13 2012	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Feb 13 2012	Record from U.S.D.C. for the District of Arizona is electronic.

Feb 17 2012	CIRCULATED.
Feb 28 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Mar 19 2012	Brief of respondent SmithKline Beecham Corporation, dba GlaxoSmithKline filed. (Distributed)
Mar 26 2012	Brief amicus curiae of Equal Employment Advisory Council filed. (Distributed)
Mar 26 2012	Brief amicus curiae of Center for Constitutional Jurisprudence filed. (Distributed)
Mar 26 2012	Brief amicus curiae of Pharmaceutical Research and Manufacturers of America filed. (Distributed)
Mar 26 2012	Brief amicus curiae of National Federation of Independent Business Small Business Legal Center filed. (Distributed)
Mar 26 2012	Brief amicus curiae of Chamber of Commerce of the United States of America filed. (Distributed)
Mar 26 2012	Brief amici curiae of Washington Legal Foundation, et al. filed. (Distributed)
Apr 2 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Apr 6 2012	Reply of petitioners Michael Shane Christopher, et al. filed. (Distributed)
Apr 16 2012	Argued. For petitioners: Thomas C. Goldstein, Washington, D. C.; and Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.) For respondent: Paul D. Clement, Washington D. C.
May 25 2012	Letter from counsel for petitioners filed. (Distributed)
Jun 18 2012	Adjudged to be AFFIRMED Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Thomas, JJ., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.
Jul 20 2012	JUDGMENT ISSUED.

PETITION
FOR
WRIT OF
CERTIORARI

No. 11-

In the

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
and FRANK BUCHANAN,

Petitioners

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A, GLAXOSMITHKLINE

Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITES STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

The outside sales exemption of the Fair Labor Standards Act exempts from the overtime requirements of the Act "any employee employed . . . in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary . . .)." 29 U.S.C. § 213(a)(1). The Secretary of Labor has implemented various regulations that "define and delimit" the outside sales exemption and, filing as *amici* in this and other related matters, has interpreted these regulations to find the exemption inapplicable to pharmaceutical sales representatives. A split exists between the Second and Ninth Circuits concerning whether this interpretation is owed deference and whether the outside sales exemption of the Fair Labor Standards Act applies to pharmaceutical sales representatives.

The questions presented are:

(1) Whether deference is owed to the Secretary's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael Shane Christopher and Frank Buchanan respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-36a) is reported at 635 F.3d 383 (9th Cir. 2011). The order of the district court granting respondent's motion for summary judgment (App., *infra*, 37a-47a) is unreported but is available at 2009 WL 4051075, and the order of the district court denying petitioners' Motion to Alter or Amend Judgment (App., *infra*, 48a-52a) is also unreported but is available at 2010 WL 396300.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2011. A petition for Panel Rehearing and for Rehearing En Banc was denied on May 17, 2011 (App., *infra*, 53a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Department of Labor's regulation outlining the "General rule for outside sales employees" provides in pertinent part:

> (a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:
>
> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.
>
> (b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work.
>
> . . .

29 C.F.R. § 541.500(a) & (b).

Section 3(k) of the Fair Labor Standards Act provides that: "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k).

The Department of Labor's regulation at 29 C.F.R. § 541.501(b) provides that: "Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of intangible and valuable evidences of intangible property. Section 3(k) of the Act states that 'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

A related Department of Labor regulation entitled "Promotion work" provides in pertinent part that: "Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule." 29 C.F.R. § 541.503(a).

Other pertinent provisions of the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.*, and pertinent regulations of the Department of Labor promulgated thereunder, 29 C.F.R. §§ 541.500 – 541.503, are set forth in the appendix to this petition (App., *infra*, 54a-63a).

STATEMENT

This petition presents a recurring issue of national importance, on which circuit courts of appeals are split, as to the deference owed to an interpretation by the Department of Labor of its own regulations promulgated under the Fair Labor Standards Act ("FLSA"). In enacting the Fair Labor Standards Act of 1938 to protect American workers, Congress expressly delegated authority to administer the Act to the Department of Labor ("DOL"). As a result of Congress's delegation of authority, the DOL has acquired over seventy years of experience interpreting and administering the FLSA, promulgating regulations thereunder, and considering the statute's application to diverse positions across the broad spectrum of employment settings in this country.

Petitioners are two among approximately 90,000 pharmaceutical sales representatives ("PSRs") employed within the American pharmaceutical industry[1] to visit physicians' offices and encourage physicians to prescribe their employer's products to their patients. Petitioners filed suit under the FLSA seeking overtime pay on behalf of a nationwide class of PSRs employed by Respondent SmithKline Beecham, Corp., dba GlaxoSmithKline ("GSK"). Numerous similar suits have been filed throughout the country by PSRs performing identical business functions for various pharmaceutical companies.[2]

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[1] *See* App., *infra* 8a, n. 10.

[2] *E.g., Kuzinski v. Schering Corp.*, 384 F. App'x 17 (2d Cir. 2010) (holding in plaintiffs' favor in connection with *Novartis* decision on same date), *cert. denied*, 131 S. Ct. 1567 (U.S. Feb.28, 2011) (No. 10-459); *Palacios v. Boehringer Ingelheim Pharm., Inc.*, 2011 WL 2837464 (S.D. Fla. July 12, 2011); *Harris v. Auxilium Pharm., Inc.*, 2010 WL 3817150 (S.D. Tex. 2010), *appeal docketed*, No. 11-20027 (5th Cir. Jan. 24, 2011); *Jackson v. Alpharma, Inc.*, 2010 WL 2869530 (D.N.J. 2010), *appeal docketed*, No. 10-3531 (3rd Cir. Aug. 26, 2010); *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740 (N.D. Ill. 2010); *Delgado v. Ortho-McNeil, Inc.*, 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009); *Schaefer-LaRose v. Eli Lilly & Co., Inc.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009), *appeal docketed*, No. 10-3855 (7th Cir. Dec. 13,

The pharmaceutical industry uniformly considers its PSRs exempt from the overtime provisions of the FLSA as outside sales employees.

Because Congress delegated administrative authority to the Department of Labor to define and delimit the scope of FLSA exemptions, the DOL's regulations and reasonable interpretations thereof "are legally binding." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 164 (2007); *Auer v. Robbins*, 519 U.S. 452 (1997). The overtime exemptions are affirmative defenses as to which the employer bears the burden of proof. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974). FLSA exemptions are construed narrowly against the employer in order to further the remedial purposes of the Act. *A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

Filing as *amicus curiae* in this matter (App., *infra*,64a-90a) and in the Second Circuit, the Department of Labor set forth its interpretation of the relevant regulations pertaining to the outside

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2010); *Ruggeri v. Boehringer Ingelheim Pharm., Inc.*, 585 F. Supp. 2d 254 (D. Conn. 2008); *Kaiser v. Daiichi Sankyo, Inc.*, No. 1:10-cv-918 (S.D. Ohio filed Dec. 21, 2010); *Shatto v. Astrazeneca Pharm., LP*, No. 1:10-cv-1519WTL-MJD (S.D. Ind. filed Nov. 23, 2010); *Bethune v. Bristol-Myers Squibb Co.*, No. 10-CIV-08700 (S.D.N.Y. filed Nov. 18, 2010); *Heldman v. King Pharm., Inc.*, No. 3-10-1001 (M.D. Tenn. filed Oct. 22, 2010); *Jones v. Takeda Pharm. N. Am., Inc.*, No. 1:10-cv-06240 (N.D. Ill. filed Sep. 29, 2010); *Camp v. Lupin Pharm., Inc.*, No. 3:2010cv01403 (D. Conn. filed Sep. 2, 2010); *Quinn v. Endo Pharm., Inc.*, No. 1:2010cv11230 (D. Mass. filed July 22, 2010); *Curley v. Astellas US LLC*, No. 1:10-cv-05240-WHP (S.D.N.Y. filed Jul. 9, 2010); *Evavold v. Sanofi-Aventis US Inc.*, No. 09-cv-05529 (D.N.J. filed Oct. 19, 2009); *Coultrip v. Pfizer, Inc.*, No. 06-cv-09952-AKH (S.D.N.Y. filed Oct. 19, 2006).

sales exemption, along with its conclusion that PSRs are non-exempt and therefore entitled to overtime pay. The Second Circuit deferred to this interpretation by the DOL in the matter of *In re Novartis Wage & Hour Litigation*, 611 F.3d 141, 149 (2d Cir. 2010) ("*Novartis*"). The Ninth Circuit, however, declined to defer to the DOL's position. The Ninth Circuit's decision created a circuit split not only on the underlying issue of applying the exemption to PSRs, but also on the issue of deference owed to the DOL's interpretation of its regulations.

1. The Outside Sales Employee Exemption.

By regulatory definition, employees falling within the outside sales exemption necessarily "make sales." 29 C.F.R. § 541.500(a). The FLSA articulates that a "sale" "includes any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 U.S.C. § 203(k). Regulations pertaining to the exemption further describe "sales" as including "transfer of title" to property, 29 C.F.R. § 541.501(b), and explain that promotional work "incidental to sales made, or to be made, by someone else" does not qualify as sales, *id.* § 541.503(a). In short, the regulations provide that employees who merely promote goods and services cannot qualify for the exemption; rather, only those who "sell" goods and services are exempt. *See id.*

Consistent with the FLSA definition and this regulatory scheme, the DOL has declined repeatedly over several decades to apply the exemption to promoters who do not make their own sales. In 1940, stating that "exemptions [have] been asked" for "sales promotion men and missionary men," the DOL concluded that "it would be an unwarrantable extension" of the exemption "to describe as a salesman anyone who does not in some sense make a sale" and that "sales promotion and missionary men are persons who normally make no sales at all." Wage and Hour Division, U.S. Department of Labor, *Executive, Administrative, Professional . . . Outside Salesman Redefined, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearing Preliminary to Redefinition* 46-47 (Oct. 10, 1940) ("Stein Report").

Since that time, the DOL has found the exemption inapplicable to: workers engaged in "soliciting promises of future charitable donations or 'selling the concept' of donating to a charity," WH Opinion Letter, 2006 WL 1698305 (May 26, 2006); college recruiters "engaged in identifying qualified customers, i.e., students, and inducing their application to the college, which in turn decides whether to make a contractual offer of its educational services to the applicant," WH Opinion Letter, 1998 WL 852683 (Feb. 19, 1998); and individuals employed to encourage, or "sell the concept" of, donating tissue and organs, WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994). Courts likewise have found the exemption inapplicable to employees who merely promote in furtherance of another's sales. *See e.g. Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008) (selling the idea of joining the army, without obtaining binding commitments, does not qualify as making sales); *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 260 (5th Cir. 1969) (employees who "pave the way" for magazine subscription orders ultimately taken by other employees do not make their own sales).

2. The Question of Pharmaceutical Sales Representatives Making "Sales."

Consistent with its regulations and prior pronouncements regarding the exemption, the DOL views PSRs as promoters who do not make their own sales. App., *infra,* 77a. A PSR's role is to promote pharmaceuticals to physicians in an effort to influence their prescribing habits. In furtherance of this goal, PSRs visit physicians' offices, seek out opportunities to promote the employer's products by discussing the products with physicians, provide samples of the products to physicians, and sometimes ask physicians for non-binding "commitments" to prescribe the products where medically appropriate. App., *infra,* 4a-6a. Industry standards prevent PSRs from obtaining any kind of binding commitment from the physicians they visit. App., *infra,* 27a.

Neither physicians nor patients can purchase or order pharmaceuticals from a PSR. PSRs do not negotiate prices or contracts for pharmaceutical products with anyone. App., *infra,* 5a. Actual sales of pharmaceutical products occur when hospitals, pharmacies and wholesalers purchase the products from the pharmaceutical company. App. *infra,* 4a. In short, there is no direct link between a PSR's promotional efforts directed to a physician and the actual purchase of a pharmaceutical product from the PSR's employer.

As such, the position of Petitioners, and of the DOL, is that the outside sales employee exemption does not apply to PSRs, because they do not make their own sales.

3. The Second Circuit's Decision in *Novartis*.

In an amicus brief filed in the Second Circuit, the DOL articulated its position that PSRs' duties do not fall within the exemption because they do not "make sales." *See Novartis*, 611 F.3d at 149. The Chamber of Commerce, filing as *amicus curiae* supporting the pharmaceutical company, argued that the regulatory sales definition merely "parrots" the statutory sales definition and that, as such, the DOL's interpretation thereof is entitled to no deference under this Court's decision in *Gonzales v. Oregon*, 546 U.S. 243 (2006). *Novartis*, 611 F.3d at 149. Under *Gonzales*, an agency is not entitled to controlling deference on its interpretation of a regulation that merely "parrots" Congress's statutory language, because "an agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales*, 546 U.S. at 257.

The Second Circuit noted that the regulatory scheme pertaining to the outside sales exemption elaborates on the sales definition contained in the FLSA by articulating that sales of commodities "include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." *Novartis*, 611 F.3d at 151. The Second Circuit also observed that the regulations create a distinction between sales and promotional work. *Id.* It found that these regulations, defining and delimiting the outside sales exemption by articulating what types of efforts qualify employees for the exemption, "do far more" than simply paraphrasing or parroting the FLSA's sales definition. *Id.* at 153.

Considering the work performed by PSRs in the context of these regulations, the Second Circuit concluded:

> In sum, where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

Novartis, 611 F.3d at 154. Thus, finding the DOL's interpretation of its defining and delimiting regulations neither erroneous nor inconsistent with the FLSA, the Second Circuit granted it controlling deference under *Auer v. Robbins*, and held that PSRs do not make sales and therefore are not outside salesmen. *Novartis*, 611 F.3d at 154-55.

Thereafter, Novartis petitioned this Court for a writ of certiorari, but the petition was denied. *Novartis Pharm. Corp. v. Lopes*, 131 S.Ct. 1568 (2011).

4. The Ninth Circuit's Refusal to Defer to the Department of Labor.

With the same question before the Ninth Circuit, the DOL again filed an *amicus curiae* brief indicating that, per its interpretation of the regulations, PSRs do not fall within the outside sales exemption. The Ninth Circuit, however, expressly rejected the Second Circuit's analysis on deference as well as the DOL's interpretation, concluding that it owes "no deference" to the DOL's interpretation. App., *infra*, 17a. The Ninth Circuit relied heavily on *Gonzales* in arriving at this conclusion. Focusing on the reference in 29 C.F.R. § 541.501 to the statutory definition of "sale," the court opined that the term "sales" remain "very undefined, very un-delimited" by the regulation. The panel found in *Gonzales* what it deemed "an analogous situation" in which the administering agency "fail[ed] to add specificity to the statutory scheme." App., *infra*, 22a-23a. Characterizing the DOL's amicus brief interpretation of the regulatory scheme as merely a "reinterpretation" of the statute itself, and furthermore, as "plainly erroneous and inconsistent" with the regulations, the Ninth Circuit declined to defer to the agency. App., *infra*, 23a-24a.

The panel therefore undertook its own analysis of the exemption, concluding that PSRs "make sales" and qualify for the exemption based primarily on what the panel termed "the structure and realities of the heavily regulated pharmaceutical industry." App., *infra*, 25a. The panel reasoned that although limitations imposed on the pharmaceutical industry prevent PSRs from making traditional "sales," similarities between the job duties of PSRs and of the "classical salesman" support a finding that PSRs "make sales" within the meaning of the exemption. App., *infra*, 28a-31a.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS A CIRCUIT SPLIT ON IMPORTANT QUESTIONS OF NATIONAL APPLICATION.

The Ninth Circuit acknowledged its split with the Second Circuit on the issue of deference to the DOL and the underlying issue of applying the outside sales exemption to PSRs. App., *infra*, 17a. While the PSRs in the Second and Ninth Circuit cases worked in different parts of the country for different employer pharmaceutical companies, their positions were essentially identical; indeed, the Ninth Circuit panel observed that "PSRs carry out the same business *function regardless of which drug* manufacturers they represent." App., *infra*, 8a. As such, the question of whether the exemption applies to PSRs is one that affects the operations of an entire industry, not just the specific parties in this matter.

This is a question of national application. Both *Novartis* and *Christopher*, along with a multitude of similar cases across the country, seek overtime pay under a federal law on behalf of a nationwide class of employees. With potential representatives of nationwide classes available to file in any seemingly friendly jurisdiction, national uniformity on the question is critical.

Beyond the question of whether PSRs qualify as outside sales employees, however, is the even more potentially far-reaching issue of the deference owed to an administering agency. Given the Second Circuit's deference to the DOL on the issue, the Ninth Circuit's decision creates a split among the circuits on how and where *Gonzales* applies to limit deference owed to an administering agency. This conflict between the circuits leaves confusion as to appropriate application of *Gonzales* in administrative deference cases.

These recurring issues are ripe for resolution, and this case offers the best vehicle for resolving them. This Court denied certiorari when sought by the pharmaceutical company in *Novartis*; however, at the time certiorari was requested, no circuit split yet existed on the question. The Ninth Circuit decided *Christopher* while Novartis's petition for a writ of certiorari was pending. At the time the Court denied certiorari, it was aware that Petitioners were preparing a petition for reconsideration in the Ninth Circuit. Petitioners' petition for Panel Rehearing and Rehearing En Banc was denied. Unless this Court intervenes, the question of whether PSRs are exempt from the overtime requirement as outside sales employees will remain simply a matter of the jurisdiction in which they file suit. A fundamental split between the circuits on the question of deference owed to agency interpretations of regulations likewise remains unresolved without this Court's intervention.

II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH PRECEDENT IN THIS COURT AND WITH THE PURPOSES AND REQUIREMENTS OF THE FLSA.

A. Determining Deference to Administrative Agencies under *Auer* and *Gonzales*.

The Ninth Circuit's opinion dramatically affects the landscape of administrative deference under *Auer* and *Gonzales*. The Ninth Circuit expressed concern that deferring to the DOL in this instance would amount to an expansion of *Auer*, *see* App., *infra* 24a, but in fact, its refusal to defer amounts to a vast expansion of *Gonzales*. Before the Ninth Circuit's decision in *Christopher*, *Gonzales* formed a straightforward exception to *Auer* deference, preventing an administrative agency from improperly creating "rules" outside of the notice-and-comment rulemaking process where the agency's regulations do nothing more than echo the statute. *Gonzales*, in short, furthers the principle that an agency may authoritatively interpret its own regulations that reflect its considerable experience and that were formed according to proper notice-and-comment rulemaking procedures, but may not authoritatively interpret the statute itself outside that process. After *Christopher*, however, *Gonzales* may stand for much more.

Gonzales was a federalism case in which the U. S. Attorney General, having no explicit authority to promulgate rules on the issue, attempted to overrule state-level regulations. This Court held that *Auer* deference need not be afforded to an agency interpretation of a regulatory scheme which merely "parrots" the statute. The "parroting" regulation at issue in *Gonzales* merely "repeat[ed] two statutory phrases and attempt[ed] to summarize the others. It [gave] little or no instruction on a central issue in this case." *Gonzales*, 546 U.S. at 257. Historically, however, *Gonzales* is inapplicable as long as the regulations offer some amount of interpretation beyond merely the language of the statute. *See, e.g.*, *Sierra Club v. Johnson*, 436 F.3d 1269, 1283 n.5 (11th Cir. 2006) (declining to apply *Gonzales* where a statute and regulation have some identical language, but "the regulation does more"); *Haas v. Peake*, 525 F.3d 1168, 1187 (Fed. Cir. 2008) (similar); see also *U.S. v. W.R. Grace & Co.*, 429 F.3d 1224, 1241-45 (9th Cir. 2005) (deferring to agency interpretations even though regulations in part parroted statutory language).

With respect to the meaning of "sales" for purposes of the outside sales exemption in the FLSA, the regulations offer guidance that goes well beyond merely reiterating the statutory definition. For example, while the regulation at 29 C.F.R. § 541.501 does quote the Act's statutory definition of "sale," the quotation is preceded by an explanatory statement: "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of intangible and valuable evidences of intangible property." Additionally, the promotional work regulation at § 541.503 further defines and delimits the type of work that qualifies as "sales" for purposes of the exemption.

In applying *Gonzales*, the Ninth Circuit panel dismissed the additional explanatory language in 29 C.F.R. § 541.501 regarding the "transfer of title to tangible property" as merely "open-ended." It likewise downplayed the promotional work regulation, virtually ignoring the directly applicable language of § 503(a)[3] and instead contrasting PSRs' duties with an example of promotional work provided at § 503(c). App., *infra*, 31a. The example, the court concluded, is distinguishable from PSRs' work because the promoters in the example, who visit stores to arrange merchandise and consult with the manager regarding inventory, do not ask for the type of non-binding commitments that PSRs seek from physicians. *Id.* Nothing in the regulation, however, suggests that the example provided at § 503(c) is intended as the exclusive application of the promotional work regulation. Avoiding or dismissing all of the non-parroting regulatory language addressing the meaning of "sales" under the exemption, the court rested its application of *Gonzales* on the fact that the regulatory scheme in part quotes the FLSA's definition of "sales."

The panel's holding that parroting language "is present" in the regulations, App., *infra*, 23a, is insufficient to apply *Gonzales*, since non-parroting language is also "present." Under the Ninth Circuit's rationale in applying *Gonzales* to this case, any regulation that references or quotes some portion of the underlying statute is arguably a "parroting" regulation, even where the regulation also expands upon the statutory language. *See* App., *infra*, 21a.

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[3] Indeed, to the extent that the promotional work regulation is unambiguously applicable to the work of PSRs, the panel should have accorded deference to that regulation under *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984), rather than virtually ignoring it.

(applying *Gonzales* simply because some parroting language "is present" in the outside sales regulations). As a result of the panel decision in this case, an administrative agency risks losing the authority to interpret any such regulation. Such a rule dramatically reduces administrative agencies' interpretive authority and upsets the balance formed by this Court's rulings in *Gonzales* and *Auer*.

B. The Merits of the Department of Labor's Interpretation Under the Act.

In addition to creating confusion on the issue of administrative deference, the Ninth Circuit's interpretation of the outside sales exemption departs from decades of appropriately narrow construction of the exemption, with which the DOL's interpretation, in contrast, is consistent. The preamble to the 2004 regulations addressed the question of how technological advances affecting the manner in which orders for products are placed might affect the applicability of the outside sales exemption to employees selling or promoting those products. *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22122, 22124 (Apr. 23, 2004). While the DOL agreed that technological advances should not remove from the exemption employees who "in some sense" make sales, it nevertheless emphasized that:

> [T]he Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain

> orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales. *See* 1940 Stein Report at 46 (outside sales exemption does not apply to an employee "who does not *in some sense* make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test.

69 Fed. Reg. at 22162. This language requiring that employees "in some sense" make sales in order to qualify for the exemption, much quoted by both opponents and proponents of applying the exemption to PSRs, is clearly intended to limit, not broaden, the coverage of the exemption. The DOL further articulated in the 2004 preamble its intent to include within the exemption's coverage only those employees who "'obtain a commitment to buy' from the customer and are credited with the sale." *Id.* at 22162-63.

Consistent with this principle, as discussed above, the DOL and the courts have, for decades, narrowly interpreted the "make sales" requirement of the exemption, excluding from its coverage a variety of promoters who merely pave the way for others' sales, including college recruiters, charitable solicitors, private army recruiters and student salesmen whose efforts lead to sales by others. *See* WH Opinion Letters, *supra*; *Wirtz*, 418 F.2d at 260; *Clements*, 530 F.3d 1224. Like these promoters, PSRs cannot be directly credited with any sale. While they may ask physicians for non-binding "commitments" to prescribe, such commitments simply do not amount to "commitments to buy" as referenced in the preamble.[4] Indeed, physicians make such "commitments" without even necessarily knowing the product's price. Such commitments may lead to ultimate purchases of pharmaceutical products; however, such ultimate purchases do not involve the PSR whatsoever. In short, the "sale" is made by someone else. Thus, unlike typical exempt outside sales employees, a PSR does not receive commissions for "sales," since no "sale" or commitment can actually be "credited" to the PSR. PSR incentive compensation is linked not to the number of "commitments" obtained, but rather (in part) to actual market share, or products purchased within their territories, which may be influenced by many factors separate from the PSR's efforts (e.g. other marketing efforts, such as direct-to-consumer advertising). App., *infra*, 78a-79a. PSRs indeed may pave the way for ultimate sales of pharmaceuticals, but as such they are promoters, not salesmen.

The DOL's interpretation of its regulations, finding that "sales" requires some consummated transaction, comports with accepted rules of statutory construction as applied to the FLSA definition of "sales." Under § 203(k), "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." Of these options, the Ninth Circuit panel fit PSRs' activities into the final term, "other disposition," finding it to be a broad catch-all category that encompasses meaning well beyond the other terms contained in the FLSA's definition of "sale." App., *infra*, 25a. This Court has explained, however, that under the *ejusdem generis* rule of statutory construction, "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). Under the DOL's interpretation, "other disposition," like the terms that precede it, must require some consummated transaction. App., *infra*, 79a. The panel's interpretation to the contrary, however, amounts to an expansive interpretation, inconsistent with the principle that FLSA exemptions are to be construed narrowly. *See A.H. Phillips v. Walling*, 324 U.S. 490, 493 (1945).

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[4] As an example, a physician might "commit" to a PSR to prescribe a particular pharmaceutical for appropriate patients, but then not see any patients requiring that pharmaceutical. In such circumstances, a commitment would not equate to any sale whatsoever.

The DOL's interpretation is neither "plainly erroneous" nor "inconsistent" with its regulation. *See Auer*, 519 U.S. at 461 (citations omitted). In substituting its judgment for the DOL's delegated authority to interpret the FLSA, the panel states summarily that it finds the DOL's amicus brief interpretation plainly erroneous and inconsistent with its regulations, App., *infra*, 24a, but the panel's analysis fails to indicate such plain error or inconsistency. The closest the panel comes to indicating some inconsistency between the DOL's regulations and amicus brief interpretation is the statement that "[w]e cannot square [the conclusion that PSRs are not salespeople] with Section 3(k)'s open-ended use of the word 'sale,' which includes 'other disposition[s]." App., *infra*, 28a. However, as discussed above, applying the rules of statutory construction to the term "other disposition" indicates that even that open-ended term involves a consummated transaction; accordingly, the DOL's interpretation to this effect is both reasonable and consistent with the text of the regulation. Furthermore, the DOL's interpretation takes into account not only the terms used in the statutory definition, but also places them in the context of the relevant defining and delimiting regulations, as discussed herein. The panel's disagreement with the DOL's interpretation is not enough to render that interpretation "plainly erroneous" or "inconsistent with the regulation," and does not justify simply adopting an alternate view of the regulation. *See e.g. Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011) (where a regulation is subject to two "plausible" interpretations, the agency's interpretation is entitled to controlling deference).

To the extent that the regulations defining and delimiting the outside sales exemption are confusing or conflicting in the context of PSRs, it is within the DOL's delegated authority as the administering agency to resolve the question. *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007). The DOL's interpretation is reasonable and consistent with the plain language of its regulations and with the statutory definition of sales. It comports with past interpretations of the exemption by both the DOL and the courts and with accepted rules of statutory construction. The Second Circuit properly deferred to this reasonable and consistent interpretation by the administering agency. The Ninth Circuit's interpretation, in contrast, is broad and expansive, retrofitting the exemption to an industry in which promoters simply cannot and do not make "sales." Since PSRs promote pharmaceutical products in furtherance of sales made by others, and since they do not in any sense sell or take orders for such products, they do not fit within the outside sales exemption. Certiorari is warranted to resolve the split on the DOL's regulatory interpretation and authority and to provide needed national uniformity of application of the FLSA across the pharmaceutical industry.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted.

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APPENDIX

APPENDIX A - Opinion of the United States Court of Appeals for the Ninth Circuit

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10-15257

MICHAEL SHANE CHRISTOPHER and FRANK BUCHANAN, *Plaintiffs-Appellants,*

v.

SMITHKLINE BEECHAM OPINION CORPORATION, DBA GlaxoSmithKline,

Defendant-Appellee.

Appeal from the United States District Court for the District of Arizona, D.C. No. 2:08-cv-01498-FJM

Argued and Submitted: November 3, 2010

Filed February 14, 2011

Before: Mary M. Schroeder, Richard C. Tallman, and Milan D. Smith, Jr., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

Opinion of the Court

COUNSEL

Michael R. Pruitt, Esq.; Christine F. Crockett, Esq., Jackson White, P.C., Mesa, Arizona, for plaintiffs-appellants Michael Christopher and Frank Buchanan.

Neal D. Mollen, Esq.; Barbara L. Johnson, Esq., Paul Hastings Janofsky & Walker, L.L.P., Los Angeles, California, for defendant-appellee SmithKline Beecham Corporation.

OPINION

Plaintiffs-Appellants Michael Christopher and Frank Buchanan appeal the judgment of the district court that they are not entitled to overtime pay under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq*. Plaintiffs were employed as Pharmaceutical Sales Representatives (PSRs) for Defendant-Appellee SmithKline Beecham Corporation d/b/a GlaxoSmithKline (Glaxo). Glaxo classified Plaintiffs as "outside salesmen"—a legal designation that exempts an employee from the FLSA's overtime-pay requirement. Plaintiffs' suit challenges Glaxo's classification and seeks back pay.

The district court granted summary judgment to Glaxo. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. Pharmaceutical Sales Representatives

Glaxo is in the business of developing, producing, marketing, and selling pharmaceutical products. Christopher and Buchanan began working as PSRs for Glaxo in 2003. Glaxo terminated Christopher in May 2007. Buchanan's career at Glaxo ended when he accepted a PSR position at another pharmaceutical company. Since the enactment of the Pure Food and Drug Act of 1906, Pub. L. No. 59-384, 34 Stat. 768, federal law has, to varying degrees, regulated and influenced the sale of pharmaceuticals.[5] In 1938, the Federal Food, Drug, and Cosmetic Act, Pub. L. 75-717, 52 Stat. 1040 (codified as amended at 21 U.S.C. §§ 301 *et seq.*), clothed the Food and Drug Administration with broad regulatory authority over, *inter alia*, drug manufacturers.[6] The Durham-Humphrey Amendment of 1951 established the first comprehensive scheme governing the sale of prescription pharmaceuticals to the public. *See* Pub. L. No. 82-215, 65 Stat. 648 (1951) (codified at 21 U.S.C. § 353(b)). Importantly, for our purposes, Durham-Humphrey formalized the now well-established dis-tinction between prescription and over-the-counter drugs.[7] The Controlled Substances Act of 1970, Pub. L. 91-513, 84 Stat. 1260, continues the prescription/non-prescription dichotomy, and prohibits dispensing the former without the authorization of a "practitioner, other than a pharmacist, to an ultimate user." 21 U.S.C. § 829(b)-(d). Currently, all pharmaceuticals requiring a physician's prescription are branded "Rx only." 21 U.S.C. § 353(b)(4)(A).

We analyze this case within the framework of how Glaxo sells its "Rx only" products to an "ultimate user." A key, undisputed fact underlying our analysis is that the ultimate user—the patient—cannot purchase a prescription drug without first obtaining a physician's authorization.

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[5] *Cf.* Francis B. Palumbo & C. Daniel Mullins, *The Development of Direct-to-Consumer Prescription Drug Advertising Regulation*, 57 Food & Drug L.J. 423, 424-27 (2002).

[6] *See* Palumbo & Mullins, *supra*, at 425 & n.17.

[7] *See* Palumbo & Mullins, *supra*, at 426.

Because Glaxo is proscribed from selling Rx-only products directly to the public, it sells its prescription pharmaceuticals to distributors or retail pharmacies, which then dispense those products to the ultimate user, as authorized by a licensed physician's prescription. In this restrictive sales environment, Glaxo employs PSRs to make "calls" on physicians to encourage them to prescribe Glaxo products. On calls, PSRs typically present physicians with a variety of information about Glaxo products, provide product samples, and attempt to convince the physicians to prescribe Glaxo products, when medically appropriate, over competitor products. PSRs also try to build business relationships with physicians, respond to their concerns, and recruit them to attend Glaxo-organized dinners and conventions. Each PSR is responsible for a particular "drug bag" of medications he or she tries to induce physicians to prescribe. As perceived by the Plaintiffs, the primary duty of a PSR is to communicate features and benefits of Glaxo products to physicians. In Buchanan's words, he tried to "convince prescribers that the benefits of [Glaxo's] products warranted them prescribing that product to the appropriate patient."

PSRs usually work outside of a Glaxo office and spend much of their time traveling to the offices of, and working with, physicians within their assigned geographic territories. Plaintiffs visited between eight and ten physicians each day, usually between the hours of 8:30 a.m. and 5:00 p.m. Plaintiffs claim that they worked between ten and twenty hours each week outside of normal business hours, for which they received no overtime wages. When not making calls on physicians, Plaintiffs studied Glaxo products and relevant disease states, prepared new presentation modules, answered phone calls, checked email, generated reports, and attended events on evenings and weekends.

Before a PSR makes his or her daily calls, Glaxo provides him or her with detailed reports about the physicians he or she will visit. These reports include information about a physician's prescribing habits and drug preferences, the market volume of Glaxo products prescribed by the physician versus the volume of competitor products, and the volume of prescriptions filled in a particular region. Glaxo also provides each PSR with a budget to use for speaker programs and to engage socially with physicians.

Glaxo prepares and provides information about its products —called "Core Messages"—for PSRs to present to physicians during calls. Core Messages include information about product benefits and risks, dosage instructions, and the types of patients for whom Glaxo recommends each product. Glaxo expects PSRs to use the Core Messages and then "[d]evelop and deliver informative sales presentations based on customer needs."

PSRs do not carry any prescriptions with them for direct sale; rather, Glaxo provides PSRs with small amounts of sample products to distribute to physicians. PSRs do not contact patients or market anything to them. To the contrary, in compliance with federal law, PSRs cannot sell the samples, take orders for any medication, or negotiate drug prices or contracts with either physicians or patients.

Glaxo recruits applicants who have prior sales experience for its PSR positions. When Glaxo hires new PSRs, it provides them with more than one month of training that focuses on making presentations, learning about Glaxo products, and building interpersonal skills. PSRs are taught how to ask for a commitment from a physician to prescribe Glaxo products if the physician believes the medication is appropriate.

Since 2001, Glaxo has instructed PSRs on various methods of completing a call. When Plaintiffs were hired, they received training in Glaxo's "Assertive Selling Always Professional (ASAP)" model. They were also trained to follow Glaxo's "Winning Practices" program. ASAP and Winning Practices are similarly structured and emphasize that a PSR should: (1) analyze and understand what is happening in an assigned region; (2) work with the team to drive results; (3) master professional knowledge to understand clinical management of patients; (4) prepare for calls; (5) "Sell Through Customer-Focused Dialogue"; (6) obtain the strongest commitment possible from a healthcare professional at the end of the call; and (7) provide added value to the customer relationship.

In 2004, Glaxo started a new program called "When? Why? How?" which distilled the old model into three questions PSRs should use to bond the targeted physician to the Glaxo brand: "(1) When should I use this product? (2) Why should I use this product? (3) How should I use this product?" PSRs strive to ensure that their targeted physicians have the answers to all three questions before PSRs leave the physicians' offices.

Plaintiffs received two types of pay—salary and incentive based compensation. Incentive-based compensation is paid if Glaxo's market share for a particular product increases in a PSR's territory, sales volume for a product increases, sales revenue increases, or the dose volume increases. Glaxo aims to have a PSR's total compensation be approximately 75% salary and 25% incentive compensation.[8] However, the dollar value of incentive-based compensation is uncapped.

The process of providing information to physicians is referred to within the pharmaceutical industry as "detailing," and PSRs have traditionally been known by the moniker "detail men" or "detailers." Plaintiffs' job functions during their tenures at Glaxo varied little from those of their predecessors of fifty or sixty years ago.[9] Moreover, there is homogeneity within the industry—PSRs carry out essentially the same business functions regardless of which drug manufacturers they represent.[10]

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[8] In 2004, Christopher received $72,576 gross pay, of which $29,993 was incentive compensation (41% of gross); in 2005, he received $67,243, of which $21,231 was incentive (32% of gross); and in 2006, he received $77,552, of which $28,249 was incentive (37% of gross).
In 2004, Buchanan received $70,740 gross pay, of which $19,232 was incentive compensation (27% of gross); in 2005, he received $74,358, of which $27,743 was incentive (32% of gross); in 2006, he received $84,932, of which $32,519 was incentive (38% of gross); and in 2007, he received $75,776, of which $19,957 was incentive (26% of gross).

[9] *See* Thomas L. Hafemeister, et ano., *Beware Those Bearing Gifts: Physician's Fiduciary Duty to Avoid Pharmaceutical Marketing*, 57 U. Kan. L. Rev. 491, 493-94 (2009) ("Detailing is the term used to denote the practice of pharmaceutical representatives visiting the offices of physicians or otherwise contacting physicians to promote their company's drugs and/or medical devices."). The pharmaceutical-representative/detailist position has deep roots in the industry, dating back until at least the 1930s. *See* Lars Noah, *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives*, 47 Food & Drug L.J. 309, 311 (1992) ("During the 1930s, . . . [m]arketing efforts by salesmen therefore focused almost exclusively on retail pharmacies."). Indeed, we trace the first mention of detail men

The pharmaceutical industry self-regulates PSRs and their contacts with physicians by way of a voluntary industry-wide code of conduct—the Pharmaceutical Research and Manufacturers of

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in the federal case reports to 1940. *See United States v. Fifty-Nine Tubes, More or Less, of Lutein Tablets*, 32 F. Supp. 958, 960 (S.D.N.Y. 1940) (describing how "detail men or salesmen" interacted with physicians); *see also Motus v .Pfizer, Inc.*, 358 F.3d 659, 661 (9th Cir. 2004) (referring to "Pfizer's detail men" providing drug information to a physician); *N. Cal. Pharm. Ass'n v. United States*, 306 F.2d 379, 386 (9th Cir. 1962) (" 'Detail men,' or local sales representatives of the out-of-state manufacturers are constantly at work in northern California acquainting physicians and pharmacists with new drugs, stimulating interest generally in the firm's products, and urging physicians to prescribe, and pharmacists to order, the manufacturer's goods."); *Schering Corp. v. Sun Ray Drug Co.*, 320 F.2d 72, 74 (3d Cir. 1963) (explaining company's advertising included "efforts on the part of its detail men (who are salesmen)"); *Hoffmann-La Roche, Inc. v. Schwegmann Bros. Giant Super Mkts.*, 122 F. Supp. 781, 783 (E.D. La. 1954) ("[Detail men] regularly call upon physicians . . .").

[10] *See e.g., IMS Health, Inc. v. Mills*, 616 F.3d 7, 14 (1st Cir. 2010) ("Detailing is a massive and expensive undertaking for pharmaceutical manufacturers, which spend billions of dollars a year to have some 90,000 pharmaceutical sales representatives make weekly or monthly one-on-one visits to prescribers nationwide."); *Pfizer, Inc. v. Astra Pharm. Prods. ,Inc.*, 858 F. Supp. 1305, 1314 (S.D.N.Y. 1994) ("It is not disputed that the parties' marketing efforts are conducted in substantially similar ways through (a) advertising in medical journals, (b) mailings sent to doctors, and (c) the use of large forces of 'detail men' who solicit doctors at the latter's offices and discuss their products directly with the doctors.").

America (PhRMA) Code. The PhRMA Code does not speak of selling, but, rather, provides that "[i]nteractions [with health care professionals] should be focused on informing [them] about products, providing scientific and educational information, and supporting medical research and education." The PhRMA Code refers to PSRs as "industry representatives" and states that "[i]nformational presentations and discussions by industry representatives speaking on behalf of a company provide valuable scientific and educational benefits." The PhRMA Code also regulates the provision of meals and gifts to physicians and professes an industry commitment to independent medical decisionmaking.

II. Proceedings in the District Court

This litigation commenced in August 2008, when Plaintiffs filed the Complaint challenging Glaxo's practice of requiring overtime work without paying additional compensation as a violation of 29 U.S.C. §§ 207(a)(1), 216(b). The parties crossmoved for summary judgment, and Plaintiffs moved to certify a conditional class. Glaxo contended that Plaintiffs were exempt under the "outside salesman" provision in FLSA or, alternatively, under the "administrative" exemption. 29 U.S.C. § 213(a)(1).

In granting Glaxo's motion for summary judgment, the district court addressed only the outside sales exemption and held that PSRs "unmistakably fit within the terms and spirit of the exemption." *Christopher v. SmithKlein Beecham Corp.*, No. 08 Civ. 1498 (FJM), 2009 WL 4051075, at *5 (D. Ariz. Nov. 20, 2009). The court observed that PSRs "are not hourly workers, but instead earn salaries well above minimum wage —up to $100,000 a year," and that they receive bonuses in lieu of overtime as "an incentive to increase their efforts." *Id.* The district court continued, "A PSR's ultimate goal is to close an encounter with a physician by obtaining a nonbinding commitment from the physician to prescribe the PSR's assigned product. In this highly regulated industry, that is the most a PSR can achieve." *Id.*

Thereafter, Plaintiffs moved to alter or amend the judgment based on the district court's failure to consider an *amicus* brief filed by the Secretary (Secretary) of the Department of Labor (DOL) in a FLSA appeal then pending before the United States Court of Appeals for the Second Circuit, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010). The district court rejected Plaintiffs' argument that the DOL brief was entitled to deference under either *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Auer v. Robbins*, 519 U.S. 452 (1997), and noted that the DOL's brief recapitulated the points argued at summary judgment. Finding the DOL's "current interpretation inconsistent with the statutory language and its prior pronouncements, [and] [ ] also def[ying] common sense," the district court denied the motion to amend the judgment. Plaintiffs appeal.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1291.

We review a district court's interpretation of the FLSA and its grant of summary judgment de novo.

Gieg v. DDR, Inc., 407 F.3d 1038, 1044-45 (9th Cir. 2005); *see also Dent v. Cox Commc'ns Las Vegas, Inc.*, 502 F.3d 1141, 1143 (9th Cir. 2007). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

DISCUSSION

I. The FLSA Outside Sales Exemption

The FLSA imposes minimum labor standards on employers to promote "the health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a); *Nigg v. U.S. Postal Serv.*, 555 F.3d 781, 784 (9th Cir. 2009). The FLSA was "enacted because Congress found that the existence 'in industries engaged in commerce or in the production of goods for commerce' of labor conditions detrimental to maintaining minimum standards of living necessary for health, efficiency and general well-being of workers perpetuates substandard conditions among workers, burdens commerce, constitutes an unfair method of competition in commerce, leads to labor disputes, and interferes with the orderly and fair marketing of goods." *Hale v. Arizona*, 993 F.2d 1387, 1396 (9th Cir. 1993) (en banc) (quoting 29 U.S.C. § 202(a)) (emphasis added); *see also Nigg*, 555 F.3d at 784.

[1] To meet those goals and expand employment opportunities across the economy, the FLSA includes a baseline "overtime payment requirement" that employers must pay employees "a rate not less than one and one-half times the regular rate at which he is employed" for hours worked in excess of forty per week. 29 U.S.C. § 207(a)(1). There are numerous exceptions to this general rule. *See* 29 U.S.C. § 213. These exemptions to the overtime-pay requirement vary widely from "white-collar" executive, administrative, and professional exemptions to those for babysitters. 29 U.S.C. § 213(a)(1), (15). Relevant here is one part of the "white-collar" exemption for persons employed "in the capacity of outside salesman." 29 U.S.C. § 213(a)(1); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 946 (9th Cir. 2009). The white-collar exemption removes from the overtime pay requirement:

> any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor]). . . .

29 U.S.C. § 213(a)(1) (emphasis added).

As the statute indicates, a proper interpretation of the FLSA is necessarily guided by the regulations issued by the Secretary of Labor—"[t]he FLSA grants the Secretary broad authority to 'define and delimit' the scope of the exemption for executive, administrative, and professional employees." *Auer*, 519 U.S. at 456 (alterations and citation omitted). Congress did not define the term "outside salesman" or the other white-collar exemptions in the FLSA. Rather, "[p]ursuant to Congress's specific grant of rulemaking authority, the [DOL] has issued implementing regulations, at 29 C.F.R. Part 541 [(Part 541)], defining the scope of the section 13(a)(1) exemptions." *See* Defining and Delimiting the

Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004). In 2004, the DOL's Wage and Hour Division promulgated supplemental rules concerning the outside sales and administrative exemptions (the 2004 Rule). Among other things, the 2004 Rule explained that "the major substantive provisions of the Part 541 regulations have remained virtually unchanged for 50 years." 69 Fed. Reg. at 22,124.

[2] The Secretary defines an "outside salesman" as any employee:

> (1) Whose primary duty is: (i) making sales within the meaning of section 3(k) of the Act; or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is primarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a). An employee's "primary duty" is "the principal, main, major, or most important duty that the employee performs." 29 C.F.R. § 541.700. The outside sales regulation provides:

> In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or

> display catalogue, planning itineraries and attending sales conferences.

29 C.F.R. § 541.500(b).

The Secretary's outside sales regulation references Section 3(k) of the Act. 29 C.F.R. § 541.500(a). Section 3(k) provides that " '[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The Secretary's regulations provide:

> Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 C.F.R. § 541.501(b).

In the regulations, the Secretary draws a distinction between sales work and promoting:

> Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. § 541.503(a). To illustrate the concept of promoting sales, as opposed to selling, the Secretary's regulations provides two examples—a

manufacturer's representative and a company representative who visits chain stores:

> (b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. . . . Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work. . . .
>
> (c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

29 C.F.R. § 541.503(b)-(c).

In a FLSA overtime-wage case, the question of how an employee spends his or her workday is one of fact, while the question of whether his or her activities exclude him or her from the overtime-pay requirement is one of law. *See Icicle Seafoods v. Worthington*, 475 U.S. 709, 714 (1986); *Bratt v. Cnty. of Los Angeles*, 912 F.2d 1066, 1068 (9th Cir. 1990). Although the outside sales exemption is more than seven decades old, our encounters with the exemption are few and limited to the class-certification context. *See In re Wells Fargo Home Mortg. Overtime Pay Litig.*, 571 F.3d 953 (9th Cir. 2009); *Vinole*, 571 F.3d at 939, 945. Thus, whether a PSR's job duties make him or her an outside salesperson is a question of first impression for our court.

We construe the outside sales exemption consistent with other Section 13(a) exemptions under the FLSA. The employer always has the burden of showing the exemption applies to its employee. *Bratt*, 912 F.2d at 1069; *see alsoNigg*, 555 F.3d at 788. The exemption can only apply to persons "plainly and unmistakably within [its] terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *Klem v. Cnty. of Santa Clara*, 208 F.3d 1085, 1089 (9th Cir. 2000). Because exemptions are "narrowly construed" against the employer, to meet its burden, an employer must establish that the employee satisfies *each* of the criteria set forth in the Secretary of Labor's regulations. *See Bratt*, 912 F.2d at 1069; *see also Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 751 (9th Cir. 2010). Reviewing a FLSA exemption is well understood to be "a fact-intensive" inquiry. *Vinole*, 571 F.3d at 945 (citation omitted).

II. Whether Deference to the Secretary's Position is Appropriate

[3] The Secretary's appearance as *amicus* supporting Plaintiffs requires us to determine what, if any, deference we must accord to her view that PSRs do not meet the primary duties test for the outside sales exemption. The Secretary also advocated this construction of the regulations before the Second Circuit in *Novartis*. 611 F.3d at 149. Although the *Novartis* court held that Secretary's interpretation was owed *Auer* deference, 611 F.3d at 153, our review of the relevant authorities leads us to a different conclusion. We conclude that we owe no deference to the Secretary's current interpretation of the regulations, and, in any event, we respectfully disagree with that interpretation.

A. Administrative Deference in the FLSA

When a question arises as to the meaning of the FLSA or the Secretary's regulations, we apply traditional rules of construction and, where required, administrative deference. *See, e.g.*, *Webster v. Pub. Sch. Emp. of Wash., Inc.*, 247 F.3d 910, 915 (9th Cir. 2001) (citing *Auer*, 519 U.S. at 457). Thus, if the language of a statute or regulation is unambiguous, we apply the terms as written. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000) ("[D]eference is warranted only when the language of the regulation is ambiguous."); *Chevron*, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). By contrast, when Congress has *not* "directly spoken to the precise question at issue," *Auer*, 519 U.S. at 457, we will defer to the Secretary's regulation "so long as it is 'based on a permissible construction of the statute.' " *Id.* (citing *Chevron*, 467 U.S. at 842-43). If the Secretary's regulations are themselves ambiguous, and the

Secretary uses her rulemaking authority to provide clarity, we give controlling deference to the Secretary's view unless it is "plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation and internal quotation mark omitted); *see also Christensen*, 529 U.S. at 586-87, 588 ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *cf. In re Farmers Ins. Exch., Claims Representatives' Overtime Pay Litig.*, 481 F.3d 1119, 1129 (9th Cir. 2007) ("We must give deference to the DOL's interpretation of its own regulations through, for example, Opinion Letters."). Lastly, if the Secretary interprets an *unambiguous* statute by way of an opinion letter, enforcement guidelines, or the like, her opinion is merely "entitled to respect" to the extent the interpretation has the "power to persuade" the court. *See Christensen*, 529 U.S. at 587 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

In *Novartis*, the Second Circuit held that PSRs did not meet the requirements of the outside sales exemption. As it has done here, the DOL took the position that "when an employee promotes to a physician a pharmaceutical that may thereafter be purchased by a patient from a pharmacy . . . the employee does not in any sense make the sale." *Novartis*, 611 F.3d at 153. In reviewing the Secretary's position, the Second Circuit laid out the relevant statutory and regulatory history and focused its attention on the Secretary's regulations, and, in particular, the Preamble in the 2004 Rule which "emphasized that no one could be considered a salesman within these regulations unless he in some sense made a sale." *Id.* at 152. The *Novartis* court highlighted a series of comment letters sent to the

DOL by manufacturers' associations and industry trade groups that had requested "the Department [ ] eliminate the emphasis upon an employee's 'own' sales . . . because of team selling, customer control of order processing, and increasing computerization of sales and purchasing activities. . . ." 69 Fed. Reg. at 22,162. The United States Chamber of Commerce emphasized that "promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process." *Id.* Based on these concerns, the DOL made a "minor change" to "address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales." *Id.* The 2004 Rule continues: "[T]he Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services. An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales." *Id.*

The *Novartis* court also quoted the Preamble's elaboration of the primary-duty standard: "*Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer* and are credited with the sale.' " 611 F.3d at 152 (quoting 69 Fed. Reg. at 22,162) (emphasis in original). The Secretary's interpretation is based on a 1949 DOL interpretation, which provided: "In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt." 69 Fed. Reg. at 22,162-63 (citation omitted).

The Second Circuit determined that the Secretary's regulations "do far more than merely parrot the language of the FLSA." Novartis, 611 F.3d at 153. For that reason, "the Secretary's interpretations of her regulations are [ ] entitled to 'controlling' deference unless those interpretations are 'plainly erroneous or inconsistent with the regulation.' " Id.(quoting Auer, 519 U.S. at 461 (internal quotation omitted)). The Novartis court could find no inconsistencies or errors in the Secretary's amicus position. Id. The court stated it did not believe the distribution practices of the drug company constituted an "other disposition," as that term is used in the FLSA. Rather, the court said that because "other disposition" followed a line of words which, apparently, emphasized "a sale" being consummated, "other disposition" was not intended as a "catch-all" category. Id. Ultimately, the Novartis court summarized *its reasoning:*

> [W]here the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to

> conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

Id. at 154.

C. Deference Owed in this Case

[4] Our view of the level of deference we owe to the Secretary in this matter is best captured by the Supreme Court's instruction in *Gonzales v. Oregon*: "An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." 546 U.S. 243, 257 (2006); *see also Chase Bank USA, N.A. v. McCoy*, 562 U.S. ___, (slip op. at 15) (Jan. 24, 2011) ("Accordingly, no deference was warranted to an agency interpretation of what were, in fact, Congress' words."); *N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1088 (9th Cir. 2010) ("Here, the three rules cited by the United States essentially parrot the statutory language."). The "parroting" with which the *Gonzales* Court took issue is present in the Secretary's interpretation of Section 3(k).

According to the Secretary's regulations, a salesman is someone who either "mak[es] sales within the meaning of section 3(k) of the Act" or someone who "obtain[s] orders or contracts." 29 C.F.R. 541.500(a)(1). Since there is no dispute that PSRs do not obtain orders for anything, only the "sales" element is relevant here. To define "sales within the meaning of section 3(k)," we look to 29 C.F.R. § 541.501(b), which provides that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." Section 3(k) of the Act states that " '[s]ale'" or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). Thus, the Secretary has given us two meanings with which to set the boundaries of the sales exemption. First, in 29 C.F.R. § 541.501(b), the Secretary provides an open-ended definition that sales, unsurprisingly, "include the transfer of title to tangible property." In the next sentence, the Secretary cross-references back to the language of Section 3(k) of the Act—the very language purportedly being defined. Accordingly, the Secretary's regulations define "sale" or "sell" by statutory renvoi—that is, a "sale" means a "sale." This clarifies nothing about the meaning of Section 3(k); it merely incorporates the very undefined, very un-delimited *term* the Secretary seeks to clarify. A definition dependent almost entirely on Congress's seventy-two-year old statutory language is not an example of the DOL employing its "expertise" to elucidate meaning to which we owe *Auer* deference. *See N. Cal. River Watch*, 620 F.3d at 1085-87.

In *Gonzales v. Oregon*, the Supreme Court confronted an analogous situation when it rejected the Attorney General's regulatory attempt to frustrate the implementation of Oregon's Death with Dignity Act. In that case, Oregon statutory law exempted licensed physicians from liability when they prescribed medication to hasten death for terminally ill individuals. 546 U.S. at 249-54. In 2001, shortly after a change of presidential administration, the Attorney General promulgated a new interpretive rule that restricted the use of controlled substances in physician-assisted suicides.

Id. at 254. In defending that rule, the government contended in its appeal that the judiciary was required to give "considerable deference" to the Attorney General's interpretive rule as it was "an elaboration of one of [his] own regulations." *Id.* at 256. In rejecting that contention, the Supreme Court drew meaningful distinctions with its decision in *Auer*:

> In *Auer*, the underlying regulations gave specificity to a statutory scheme the Secretary was charged with enforcing and reflected the considerable experience and expertise the [DOL] had acquired over time. . . . *Here, on the other hand, the underlying regulation does little more than restate the terms of the statute itself.* The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near equivalence of the statute and regulation belies the Government's argument for *Auer* deference.

Id. at 256-57 (emphasis added).

[5] The failure to add specificity to the statutory scheme that troubled the *Gonzales* Court, indeed the "parroting" of statutory language, is present in the Secretary's outside sales regulations. Rather than setting forth a particular test for "sale" or instructing employers to look for indicia of sales, the Secretary's regulations direct employers, employees, and this court back to the language of the FLSA. Given the admonition in *Gonzales*, we are unable to accord *Auer* deference to a regulation written in this manner.

[6] Thus, when we look to the Secretary's brief for her application of the regulations, we see only a *reinterpretation* of Section 3(k). Rather than applying the regulation to the facts presented, the Secretary has used her appearance as *amicus* to draft a new interpretation of the FLSA's language. Were we to accept the Secretary's offer, and give controlling deference even where there exists no meaningful regulatory language to interpret, we would unduly expand *Auer*'s applicability to interpretations of statutes expressed for the first time in case-by-case *amicus* filings. *See N. Cal. River Watch*, 620 F.3d at 1088 ("In this case, the *amicus* brief purports to interpret statutory, not regulatory, language."). In essence, we would sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking. *C.f. Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) ("Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking."). Accordingly, we hold that we need not give "controlling" deference to the Secretary's interpretations in this matter.[11] Furthermore, even if *Auer* applied, deference is not warranted because the Secretary's position is both plainly erroneous and inconsistent with her own regulations and practices, as demonstrated in the analysis that follows.

III. "Sales" and "Selling" in the Pharmaceutical Industry

Absent an agency-determined result, it is the province of the court to construe the relevant statutes and regulations. *N. Cal. River Watch*, 620

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[11] As explained *infra*, we likewise find unpersuasive the Secretary's interpretation of the FLSA provisions, thus vitiating any *Skidmore* deference. *See* Section III.

F.3d at 1088-89. As noted *supra*, Plaintiffs argue that by not transferring any product to physicians, they are not selling pharmaceuticals, but only "promoting" them. Plaintiffs say this distinction is warranted in light of the rule that the FLSA be "narrowly construed against . . . employers." *Webster*, 247 F.3d at 914. For its part, Glaxo urges us to view "sale" in Section 3(k) in a commonsensical fashion, while contending that the meaning of "sale" is permissive. Glaxo urges us to adopt the rationale that the phrase "other disposition" in Section 3(k)'s definition of "sale" is a broad catch-all category.[12]8 This view was cited with approval by the district court here, and is supported by the Secretary's usage, dating back to 1940, of the language that an employee must "*in some sense* make a sale." 69 Fed. Reg. at 22,162 (quoting "Executive, Administrative, Professional Outside Salesman" Redefined, Wage and Hour Division, U.S. Dept. of Labor, Report & Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition, at 46 (Oct. 10, 1940)) (emphasis added).

[7] Plaintiffs' contention that they do not "sell" to doctors ignores the structure and realities of the heavily regulated pharmaceutical industry. It is undisputed that federal law prohibits pharmaceutical manufacturers from directly selling prescription medications to patients. Plaintiffs

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[12] *See* Steven I. Locke, *The Fair Labor Standards Acts Exemptions and the Pharmaceuticals Industry: Are Sales Representatives Entitled to Overtime?*, 13 Barry L. Rev. 1, 25 (2009) ("Applying these [common-usage] definitions, it is logical to conclude that the term 'other disposition,' as it is used to define a 'sale' under the Act, includes a physician's decision to write a prescription for a particular medication.").

suggest that despite being hired for their sales experience, being trained in sales methods, encouraging physicians to prescribe their products, and receiving commission-based compensation tied to sales, their job cannot "in some sense" be called selling. This view ignores the reality of the nature of the work of detailers, as it has been carried out for decades. Plaintiffs' argument also fails to account for the fact that the relevant "purchasers" in the pharmaceutical industry, and the appropriate foci of our inquiry, are not the end-users of the drug but, rather, the prescribing physicians whom they importune frequently. *See, e.g.*, *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 678-79 (W.D. Pa. 2009) (discussing why the "professional paradigm" places the physician as the relevant decision maker in the health services industry), *aff'd on other grounds*, 372 Fed. App'x 246 (3d Cir. 2010). Unlike conventional retail sales, the patient is not at liberty to choose personally which prescription pharmaceutical he desires. As such, he cannot be fairly characterized as the "buyer." Instead, it is patient's physician, who is vested with both a moral and legal duty to prescribe medication appropriately, who selects the medication and is the appropriate focus of our "sell/buy" inquiry. In this industry, the "sale" is the exchange of non-binding commitments between the PSR and physician at the end of a successful call. Through such commitments, the manufacturer will provide an effective product and the doctor will appropriately prescribe; for all practical purposes, this is a sale. Because pharmaceutical manufacturers appreciate who the "real" buyer is, they have structured their 90,000-person sales force and their marketing tactics to accommodate this unique environment.

[8] When a PSR visits a doctor, he or she attempts to obtain the absolute maximum commitment from his or her "buyer"—a non-binding commitment from the physician to prescribe the PSR's assigned product when medically appropriate. In most industries, there are no firm legal barriers that prohibit the *actual physical* exchange of the goods offered for sale. Because such barriers do exist in this industry, the fact that commitments are non-binding is irrelevant; the record reveals that binding or non-binding, a physician's commitment to a PSR is nevertheless a meaningful exchange because pharmaceutical manufacturers value these commitments enough to reward a PSR with increased commissions when a physician increases his or her use of a drug in the PSR's bag. *See, e.g.*, *Baum*, 605 F. Supp. 2d at 681 ("This Court believes that other courts, and perhaps regulatory agencies, underestimate the significance of this oral commitment from physicians. In part, this error emerges from a misunderstanding of the ways in which human beings are socially and informally motivated. Sometimes lawyers and judges forget that a person's word means something; remarkably, many people do not actually need a 400-page contract to bind themselves to their word.").

Moreover, the industry has agreed upon and abides by the PhRMA Code to regulate the marketing of medicine to healthcare professionals—just as any consumer-products maker might develop rules to limit the express warranties its sales force might offer to a customer. Such industry practice and prevailing customs should inform our disposition. *Cf. Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 106 (2d Cir. 2010) (in resolving whether advertising sales director was an administrative or sales worker in the publishing industry "a careful consideration of [employer's] business model provides some clarity").

Under Plaintiffs' view, PSRs are not salespeople, despite the fact that more than 90,000 pharmaceutical representatives make daily calls on physicians for the purpose of driving greater sales. *See IMS Health*, 616 F.3d at 14. We cannot square this view with Section 3(k)'s open-ended use of the word "sale," which *includes* "other disposition[s]." While we recognize that the FLSA is to be narrowly construed in light of its remedial nature, that general principle does not mean that every word must be given a rigid, formalistic interpretation. For example, for over seventy years, the Secretary has emphasized a sensible application of the exemptions; in the Preamble to the 2004 Rule, the Secretary employs the openended concept that a salesman is someone who "in some sense" sells. 69 Fed. Reg. at 22,162-63 (emphasis added). In other words, while the Secretary asks us to narrowly interpret this exemption, she herself acknowledges that technical considerations alone and changes in the way sales are made should not be grounds for denying the exemption. *See* 69 Fed. Reg. at 22,162.

To further explain our common sense understanding of why PSRs make sales, we find the paradigm "outside salesman" case *Jewel Tea Co. v. Williams*—instructive. 118 F.2d 202 (10th Cir. 1941). The importance of *Jewel Tea* is illustrated by the fact that both parties and the *amicus* offer it as favorable precedent for their conflicting positions. *Jewel Tea* involved a FLSA overtime-wage suit brought by three employees of a tea, coffee, and sundry goods manufacturer and distributor. 118 F.2d at 203. The plaintiffs held the position of "route salesmen" to "sell and distribute" products to customers in their homes. *Id.* The area in which the company sold its goods was divided and "[e]ach salesman [was] assigned an exclusive territory which he cover[ed]." *Id.* The employees made no immediate deliveries but instead took orders for future delivery, although they might advance an item to a customer. *Id.* The company provided sales training and sent a supervisor with a new hire on early sales calls before permitting the employee to "go out on a route by himself." *Id.* at 204. Further, employees were taught a "five-point sale" method to employ when speaking with customers. *Id.* A certain degree of knowledge about the products and potential customers was also required—"[t]he salesman must know recipes for the preparation of the Company's products . . . [and] must learn the general requirements of each family, in order to avoid over-stocking his customer and in order to anticipate the family's needs." *Id.* After working in the field during the day, employees completed some clerical tasks at night. *Id.* at 205. Finally, employees were paid a base salary plus a commission if their collections were in excess of a sum certain. *Id.*

The *Jewel Tea* plaintiffs brought suit to collect unpaid overtime, asserting they did not fall within the "outside sales" exemption, primarily employing the argument that they were "delivery men." *Id.* at 208. In its decision denying plaintiffs overtime pay, the Tenth Circuit penned the oft-quoted justification for the outside sales exemption:

> The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great

> extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Id. at 207-08.

[9] Reviewing the undisputed facts here, we consider the rationale for applying the outside sales exemption to PSRs to be as "apparent" as it was in *Jewel Tea*. Of course, this case does not involve door-to-door consumer-product sales. But, the FLSA is not an industry-specific statute. As the Second Circuit recognized in ***Reiseck***, not all FLSA claims will involve the "archetypal businesses envisaged by the FLSA," 591 F.3d at 106. Even though there are differences, it is notable that the salesmen in *Jewel Tea* and Plaintiffs here each (1) worked in assigned territories, (2) did not make immediate deliveries, (3) were required to analyze client backgrounds, (4) received product training, (5) employed a pre-planned routine for client interaction, (6) were accompanied by supervisors for training, (7) were later subject to minimal supervisor oversight, (8) completed clerical activities at the end of the day, and (9) had a dual salary and commission-based compensation plan tied to their performance. Even though PSRs lack some hallmarks of the classic salesman, the great bulk of their activities are the same, as is the overarching purpose of obtaining a commitment to purchase (prescribe) something.

[10] The primary duty of a PSR is not promoting Glaxo's products in general or schooling physicians in drug development. These are but preliminary steps toward the end goal of causing a particular doctor to commit to prescribing *more* of the particular drugs in the PSR's drug bag. Without this commitment and the concomitant increase in prescriptions, or drug volume, or market share—i.e. without more *sales*—the PSR would not receive his or her commission salary and could soon find himself or herself unemployed. While not all steps in the PSR's daily activities constitute "selling," that fact does not render the totality of those activities non-exempt promotion; "work performed incidental to and in conjunction with the employee's own outside sales or solicitations . . . shall be regarded as exempt outside sales work . . . [and] . . . other work that furthers the employee's sales efforts also shall be regarded as exempt work." 29 C.F.R. § 541.500(b).

The Secretary's distinction between selling and promoting is only meaningful if the employee does not engage in *any* activities that constitute "selling" under the Act. This much is seen from the plain language of the regulations, which gives the example of promotional work as "a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but *does not obtain a commitment for additional purchases*." 29 C.F.R. § 541.503(c) (emphasis added). PSRs do far more than collect general data or provide consultations; indeed they ask for, and sometimes obtain, a commitment by the doctor to prescribe Glaxo drugs, and whether the doctor keeps that commitment is verified and traced using aggregated pharmacy data Glaxo collects. *See IMS Health*, 550 F.3d at 44-47 ("A valuable tool in this endeavor, available through the omnipresence of computerized technology, is knowledge of each individual physician's prescribing history.").

In *Reisick*, the Second Circuit highlighted an important distinction between selling and promoting, noting that the latter is directed to the public at large, as opposed to a particular client:

> Consider a clothing store. The individual who assists customers in finding their size of clothing or who completes the transaction at the cash register is a salesperson under the FLSA, while the individual who designs advertisements for the store or decides when to reduce prices to attract customers is an administrative employee for the purposes of the FLSA.

Reiseck, 591 F.3d at 107. At Glaxo, Plaintiffs had no interest in "generally" promoting sales by the company or improving sales across the board. Rather, Plaintiffs directed their sales efforts only towards certain products, only to a discrete group of physicians, and only within a defined geographic area. Targeting physicians is not based on mass appeals or general advertisements, but is the result of a personalized review of each physician's prescribing habits and history. The process, like any sales process, is *tailored* to the customer's preferences.

[11] We also find that the Secretary's acquiescence in the sales practices of the drug industry for over seventy years further buttresses our decision. The outside sales exemption has existed since 1938. Detail men have practiced their craft over that same period. Generally, they have been considered salespeople.[13] Until the Secretary's appearance in *Novartis*, the DOL did not challenge the conventional wisdom that detailing is the functional equivalent of selling pharmaceutical

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[13] *See N. Cal. Pharm.*, 306 F.2d at 386 (9th Cir. 1962) (" 'Detail men,' or local sales representatives. . ."); *see also IMS Health*, 550 F.3d at 54 ("In the service of *maximizing drug sales*, detailers use prescribing histories as a means of targeting potential customers more precisely and as a tool for tipping the balance of bargaining power in their favor. As such, detailing affects physician behavior and increases the likelihood that physicians will prescribe the detailers' (more expensive) drugs." (emphasis added)); *Williams v. Bristol-Myers Squibb*, Co., 85 F.3d 270, 273 (7th Cir. 1996) ("Federal law requires a maker of prescription drugs to have a samples control program designed to prevent its salesmen, who frequently give free samples to the physicians they call on, from distributing prescription drugs outside authorized channels."); *Sun Ray Drug*, 320 F.2d at 74 ("efforts on the part of its detail men (who are salesmen)"); *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1377 (S.D. Fla. 2007) ("In each of these cases, the courts found that the drugs were overpromoted by salesmen known as 'detail men,' who visited physicians' offices and encouraged physicians to prescribe the drug."); *Skill v. Martinez*, 91 F.R.D. 498, 508 (D.N.J. 1981) ("comments by drug "'detail men' (drug salesmen who visit physicians)"); *Smith, Kline & French Lab. v. State Tax Comm'n*, 403 P.2d 375, 378 (Or. 1965) ("By soliciting the stocking of plaintiff's products by druggists and the prescription of those drugs by physicians, plaintiff 's detail men perform the same sales function in plaintiff's field that salesmen soliciting actual orders from the ultimate user perform in other businesses.").

products. Indeed, the DOL has recognized as much in its Dictionary of Occupation Titles, which provides the following definition for pharmaceutical detailers:

> Promotes use of and *sells* ethical drugs and other pharmaceutical products to physicians, [dentists], hospitals, and retail and wholesale drug establishments, utilizing knowledge of medical practices, drugs, and medicines: Calls on customers, informs customer of new drugs, and explains characteristics and clinical studies conducted with drug. Discusses dosage, use, and effect of new drugs and medicinal preparations. Gives samples of new drugs to customer. Promotes and *sells* other drugs and medicines manufactured by company. May sell and take orders for pharmaceutical supply items from persons contacted.

D.O.L. Dictionary of Occupational Titles § 262.157-010 (4th ed. 1991) (emphases added). Likewise, although it emerged in a different context, we find Judge Posner's observation in *Yi v. Sterling Collison Centers, Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007), informative—while it is "possible for an entire industry to be in violation of the [FSLA] for a long time without the Labor Department noticing[, the] more plausible hypothesis is that the . . . industry has been left alone" because DOL believed its practices were lawful.

[12] In view of many similarities between PSRs and salespeople in other fields, pharmaceutical industry norms, and the acquiescence of the Secretary over the last seventy-plus years, we cannot accord even minimal *Skidmore* deference to the position expressed in the *amicus* brief. Under *Skidmore*, "[t]he fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (internal citations omitted); *see also League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1189 (9th Cir. 2002) (quoting *Skidmore*, 323 U.S. at 140) (internal quotation marks omitted). Many, if not all, of these hallmarks of "respectful" deference are absent here. The about-face regulation, expressed only in ad hoc *amicus* filings, is not enough to overcome decades of DOL nonfeasance and the consistent message to employers that a salesman is someone who "in some sense" sells. Moreover, we are unable to accept an argument that fails to account for industry customs and emphasizes formalism over practicality, in particular the argument that "obtaining a commitment to buy" is the *sine qua non* of the exemption. Under the Secretary's view, "sale" means unequivocally the final execution of a legally binding contract for the exchange of a discrete good. In addition to the point that such stringent wording is not found in Section 3(k), or plausibly implied from phrases like "other disposition," the Secretary's approach transforms what since the time of *Jewel Tea* has been recognized as a multifactor review of an employee's functions into a single, stagnant inquiry.

Telephones, television, shopping malls, the Internet and general societal progress have largely relegated the professional pitchman embodied in *Jewel Tea* to the history books. But selling continues, and, as in prior eras, a salesperson learns the nuances of a product and those of his or her potential clientele, tailors a scripted message based on intuition about the customer, asks for the customer to consider her need for the product, and then receives a commission when the customer's positive impression ultimately results in a purchase.

[13] For the past seventy-plus years, selling in the pharmaceutical industry has followed this process. PSRs are driven by their own ambition and rewarded with commissions when their efforts generate new sales. They receive their commissions in lieu of overtime and enjoy a largely autonomous work-life outside of an office. The pharmaceutical industry's representatives—detail men and women—share many more similarities than differences with their colleagues in other sales fields, and we hold that they are exempt from the FLSA overtime-pay requirement.

CONCLUSION

For the foregoing reasons, we AFFIRM the district court's summary judgment for Defendant-Appellee SmithKline Beecham Corporation.

AFFIRMED

APPENDIX B – Order of the United States District Court for the District of Arizona on Motion for Summary Judgment

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United States District Court
for the District of Arizona

No. CV-08-1498-PHX-FJM

MICHAEL SHANE CHRISTOPHER and FRANK BUCHANAN, *Plaintiffs,*
v.
SMITHKLINE BEECHAM OPINION CORPORATION, DBA GlaxoSmithKline,
Defendant.

Filed November 20, 2009

Order of the Court

[Re: Defendants' motion for summary judgment]

The court has before it plaintiffs' motion for conditional class certification (doc. 29), defendant's response (doc.34), and plaintiffs' reply (doc. 47). We also have before us defendant's motion for summary judgment (doc. 52), plaintiffs' response and cross motion for partial summary judgment (doc. 75), defendant's response and reply (doc. 77), plaintiffs' reply (doc. 82), and plaintiffs' motion for leave to file supplemental record in support of motion for conditional class certification (doc. 83), defendant's response (doc. 87), and plaintiffs' reply (doc. 89).

Defendant SmithKlein Beecham Corporation d/b/a GlaxoSmithKlein ("GSK") is in the business of developing, marketing, and selling pharmaceutical products. Plaintiffs Michael Shane Christopher and Frank Buchanan worked for GSK as pharmaceutical sales representatives ("PSR"), and were responsible for marketing and promoting GSK productsto physicians and encouraging them to prescribe those products to their patients. GSK at one time maintained as many as 9,000 PSRs to promote their products. PSOF ¶ 59. Plaintiffs brought this action contending that their jobs regularly required them to work in excess of forty hours per week and that GSK violated the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, by failing to pay them overtime compensation.

The FLSA requires employers to pay overtime compensation for hours worked in excess of forty hours per week unless a FLSA exemption applies. 29 U.S.C. § 207(a)(1). GSK contends that plaintiffs are not entitled to overtime pay because they fall within either the "outside sales" or the "administrative employee" exemptions. Id. at § 213(a)(1). Due to the remedial nature of the overtime pay requirement, "FLSA exemptions are to be narrowly construed against employers and are to be withheld except as to persons plainly and unmistakenly within their terms and spirit." Bothell v. Phase Metrics, Inc., 299 F.3d 1120, 1125 (9th Cir. 2002) (quotation omitted). The employer bears the burden of showing that an exemption applies. Id.

The FLSA's overtime compensation requirement does not apply to "any employee employed . . . in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). An employee is exempt as an outside salesperson if (1) the employee's "primary duty" is "making sales within the meaning of [29 U.S.C. § 203(k)]" or "obtaining orders or contracts," and (2) "is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a). The parties do not dispute that plaintiffs customarily and regularly performed their duties away from GSK's offices. They spent the majority of their working time in the field calling on physicians or at home preparing for their calls. Therefore, the only issue in dispute is whether plaintiffs' primary duty as a pharmaceutical sales representative was "making sales" within the meaning of § 203(k).

The FLSA defines "sale" as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The regulations provide that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). In promulgating the 2004 regulations, the Department of Labor explained that "[a]n employer cannot meet [the outside sales exemption] unless it demonstrates objectively that the employee, *in some sense*, has made sales." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004) ("Comments to 2004 Final Rule") (emphasis added). Employees "make sales" if they "obtain a commitment to buy from the customer and are credited with the sale." Id. (quotation omitted). "In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt." Id. at 22162-63. Therefore, the Department of Labor contemplates that while a sale or order may be processed in different ways, the employee only makes "sales" if his job involves obtaining commitments for purchases that are creditable to his own efforts. There is no requirement that these must be binding commitments.

Here, it was plaintiffs' responsibility as PSRs to call on physicians and discuss the features, benefits, and risks of GSK products. PSOF ¶¶ 15, 22. Their primary objective was convincing physicians to prescribe GSK products to their patients. DSOF ¶¶ 104-06. GSK furnishes PSRs with detailed reports on physicians, including their prescribing habits, their market share, and volume of prescriptions filled. PSOF ¶ 120. These reports identify healthcare professionals who have a higher likelihood of responding to marketing, based in part on how they have historically prescribed and responded to promotional activities. PSOF ¶ 116. The PSRs' efforts are focused on the top 250 physicians in their territory who prescribe for a particular disease state. PSOF ¶ 120.

All PSRs receive extensive specialized training upon hire and throughout the course of their careers with GSK. DSOF ¶¶ 5, 7. PSRs are trained on GSK's program entitled "Winning Practices," in which they learn to drive sales for each promoted product, collaborate to deliver seamless selling and service, develop expert product knowledge, gain insight into customers, organize sales calls to maximize selling time and results, sell through customer-focused dialogue, and get the best possible commitment on every call. DSOF ¶¶ 8, 9. Each PSR is expected to "close" each physician visit, ideally by requesting a commitment from the physician to prescribe the GSK drug to patients. DSOF ¶ 126.

A PSR's compensation generally consists of approximately 75% base salary and 25% incentive compensation. PCSOF ¶ 10. While it is not possible to directly link a PSR's marketing activities to a particular patient filling a prescription, PSOF ¶ 55, the incentive compensation is based, in part, on the number of prescriptions written by physicians in a PSR's assigned geographic area. DSOF ¶¶ 11-12. Plaintiffs' incentive compensation ranged from 26% to 41% of their total annual compensation between 2004 and 2007. DSOF ¶¶ 64-66, 138-41.

Despite job descriptions and job duties that incorporate standard sales training and methodology, plaintiffs contend that they do not fit within the outside sales exemption because they do not actually execute sales within the meaning of the FLSA. They contend that as PSRs they do not consummate transactions or take orders as required by the regulations. While they acknowledge that they may create a demand for GSK products, Response at 5, they contend this is promotional or educational work, not sales.

Defendant responds that plaintiffs' argument ignores the unique nature of "sales" in the pharmaceutical industry. In the traditional sales model, a salesperson pitches a product to a buyer, the buyer purchases the product, and the salesperson leaves with cash in hand. But that model does not fit the pharmaceutical industry. The Food and Drug Administration heavily regulates the pharmaceutical industry and prohibits pharmaceutical companies from selling directly to either physicians or patients. Instead, patients must obtain prescriptions from physicians, and subsequently purchase the prescribed drugs from pharmacies. However, without a prescription from a physician, there is no sale. GSK argues that in the pharmaceutical industry the true customer, in other words the individual who generates the sale, is the physician. Sales volume is directly and exclusively driven by the number of prescriptions written by physicians, and plaintiffs' job was to encourage such prescriptions.

Therefore, according to GSK, PSRs make sales in the manner that sales are made in the pharmaceutical industry. See DSOF ¶¶ 102, 107 (Plaintiff Buchanan concedes that he made sales in the way that sales are made in the pharmaceutical industry.).

Plaintiffs disagree, contending that the only "sale" that occurs in the pharmaceutical industry is from GSK to wholesalers who in turn sell the drugs to pharmacies and hospitals. But wholesalers, pharmacies, and hospitals purchase their drugs, not because a persuasive salesperson touts the merit of the product, but because of the number of prescriptions the wholesalers, pharmacies, and hospitals expect to fill. Ultimately the demand is driven by prescriptions written by physicians.

Several courts have considered whether PSRs "make sales" within the meaning of the outside sales exemption and have reached *conflicting conclusions*. Some have adopted a strict construction of the term "sale," concluding that because PSRs do not directly consummate actual sales, they do not fit within the exemption. Ruggeri v. Boehringer Ingelheim Pharm., Inc., 585 F. Supp. 2d 254, 268 (D. Conn. 2008) ("PSRs lack [the] capacity to sell, and physicians lack [the] capacity to purchase," in the strictest sense of these terms, therefore they cannot fit within the outside sales exemption); Smith v. Johnson & Johnson, No. 06-CV-4787, 2008 WL 5427802 (D.N.J. Dec. 30, 2008) (same).

Others have concluded that adopting such a "constricted reading of the FLSA ignores the Act's spirit, purpose, and goals." In re Novartis Wage & Hour Litigation, 593 F. Supp. 2d 637, 648 (S.D.N.Y. 2009), see also Schaefer-LaRose v. Eli Lilly & Co., No. 07-CV-1133, 2009 WL 3242111 (Sept. 29, 2009); Harris v. Auxilium Pharm., Inc., No. 07-CV-3938, 2009 WL 3157275 (S.D. Tex. Sept. 28, 2009). These courts recognize that in all relevant respects a PSR's encounter with a physician is the functional equivalent of an outside sale. PSRs "make sales by obtaining commitments to prescribe . . . drugs from physicians. They are credited with those sales and compensated accordingly by means of incentive payments." In re Novartis, 593 F. Supp. 2d at 653. As such, PSRs "qualify as exempt outside salespersons." Id.

There is nothing striking about the characteristics of a traditional "sale" that explains the exemption for outside sales work. In fact, the FLSA and the Department of Labor define the term "sale" somewhat loosely. The Act defines a sale as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." 29 U.S.C. § 203(k). The Department of Labor is of the view that the exemption requires a sale "*in some sense*," Comments to 2004 Final Rule, 69 Fed. Reg. at 22162. In both cases, the definitions provide for an interpretation of "sale" beyond a constricted, traditional sense of the word.

Shortly after the enactment of the FLSA, the Tenth Circuit recognized the rationale underlying the outside sales exemption:

> Such salesm[a]n, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941). Outside salespeople are exempt from the overtime compensation requirement because of the distinct characteristics of their jobs—incentive pay based on individual effort; flexible, unregulated work hours; and minimal supervision "mak[ing] adherence to an hours-based compensation scheme impractical." See In re Novartis, 593 F. Supp. 2d at 649.

The Department of Labor more recently recognized that the legislative history of the § 213(a)(1) exemptions "were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Comments to 2004 Final Rule, 69 Fed. Reg. at 22124. Moreover, the kind of work these employees performed was "difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult." Id.

Each of these factors directly correlates with a PSR's work. PSRs are not hourly workers, but instead earn salaries well above minimum wage—up to $100,000 a year. Bonuses give them an incentive to increase their effort and work longer hours. They receive bonuses in lieu of overtime. Their work is largely unsupervised. They do not punch a clock or otherwise verify their hours, making compliance with overtime provisions unrealistic. "To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman." Jewel Tea Co., 118 F.2d at 208.

The statute and supporting regulations defining the outside sales exemption were adopted in 1938, long before the development of the pharmaceutical sales industry, and few clarifications or changes have been enacted since then. The statute and regulations are intended to broadly address a multiplicity of industries found in the national economy and accordingly provide flexibility in the definition of a "sale." See 29 U.S.C. § 203(k) (a sale includes "any other disposition"). Even the Department of Labor recognizes this flexibility by suggesting that there must be a sale "in some sense," such as "obtaining a commitment to buy." Comments to 2004 Final Rule, 69 Fed. Reg. at 22162-63. The pharmaceutical industry is unique in that federal regulations prohibit a direct sale to an end-user, thereby shifting the focus of sales efforts from the consumer to the physician—the catalyst behind any pharmaceutical sale. A PSR's ultimate goal is to close an encounter with a physician by obtaining a non-binding commitment from the physician to prescribe the PSR's assigned product. In this highly regulated industry, that is the most a PSR can achieve. His compensation is designed to encourage him to work during his lunch hour and into the evening, hosting meals, meetings, and presentations, all for the purpose of increasing the sales of his assigned products in his territory, with a payoff in the form of bonuses. In all regards, a PSR engages in what is the functional equivalent of an outside salesperson and to hold otherwise is to ignore reality in favor of form over substance. We decline to adopt a hyper-technical construction of the regulations that runs counter to the purpose of the Act. Instead, because plaintiffs plainly and unmistakably fit within the terms and spirit of the exemption, we conclude that they are exempt employees under the outside sales exemption.[14] Pharmaceutical sales representatives are salespeople.

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[14] Because we conclude that plaintiffs qualify as exempt employees under the FLSA's outside sales exemption, we need

Therefore, **IT IS ORDERED GRANTING** GSK's motion for summary judgment (doc. 52), and **DENYING** plaintiffs' cross motion for summary judgment (doc. 75).

IT IS FURTHER ORDERED DENYING plaintiffs' motion for conditional class certification as moot (doc. 29), and **DENYING** plaintiffs' motion to supplement the record as moot (doc. 83).

The clerk shall enter final judgment.

DATED this 20th day of November, 2009.

Frederick J. Martone

Frederick J. Martone
United States District Judge

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not consider whether they also fit within the administrative employee exemption. Moreover, our summary judgment ruling in favor of GSK obviates the need to consider plaintiffs' motion for conditional class certification.

APPENDIX C - Order of the United States District Court for the District of Arizona on Motion to Alter or Amend Judgment

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United States District Court
for the District of Arizona

No. CV-08-1498-PHX-FJM

MICHAEL SHANE CHRISTOPHER and FRANK BUCHANAN, *Plaintiffs*,

v.

SMITHKLINE BEECHAM OPINION CORPORATION, DBA GlaxoSmithKline, *Defendant*.

Filed February 1, 2010

Order of the Court
[Re: Motion to Alter or Amend Judgment]

On November 20, 2009, we entered an order (doc. 93) granting summary judgment in favor of defendant, based on our conclusion that pharmaceutical sales representatives fit within the outside sales exemption of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 213(a)(1). We now have before us plaintiffs' motion to alter or amend the judgment (doc. 96), defendant's response (doc. 97), and plaintiffs' reply (doc. 98).

This case turns on the definition of "sale" under the FLSA. Before we entered our order, plaintiffs submitted an *amicus curiae* brief filed by the Department of Labor ("DOL") in an action pending in another circuit, in which the DOL took the position that a "sale" for the purpose of the outside sales exemption "requires a consummated transaction directly involving the employee for whom the exemption is sought." DOL brief at 11. The DOL opined that because pharmaceutical sales representatives do not make "actual sales," id. at 5, 10, the outside sales exemption does not apply. The arguments raised in the DOL brief were the same arguments presented in plaintiffs' briefs in the instant action. We have considered each of those arguments and rejected them. Nevertheless, plaintiffs now contend that the position taken by the DOL in its *amicus* brief is entitled to controlling deference. We disagree.

Under Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2782 (1984), a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. Here, the DOL's interpretation is contained in an *amicus* brief and was not subject to the rigors of the Administrative Procedure Act, or otherwise promulgated in the exercise of the agency's rulemaking authority. "[I]nterpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law–do not warrant Chevron-style deference." Christensen v. Harris County, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662 (2000); see also Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 157, 111 S. Ct. 1171, 1179

(1991); Gonzales v. Oregon, 546 U.S. 243, 255-56, 126 S. Ct. 904, 915 (2006).

Nor is the DOL's *amicus* brief entitled to deference under Auer v. Robbins, 519 U.S. 452, 461, 117 S. Ct. 905, 911 (1997). While an agency's interpretation of its own regulations is generally entitled to substantial deference, id., the regulations at issue here merely restate the terms of the statute itself. The FLSA defines "sale" as "includ[ing] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The regulations, in turn, provide that an employee is exempt as an outside salesperson if the employee is "making sales within the meaning of [29 U.S.C. § 203(k)]." 29 C.F.R. § 541.500(a)(1)(i). The regulations only marginally expound upon the statutory definition by providing that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." Id. § 541.501(b). Plaintiffs' reference to regulations that define "promotion work," 29 C.F.R. § 541.503, and "primary duty," id. § 541.700, do not serve to define or delimit the definition of "sale," and therefore do not advance their position. Because the underlying regulations largely repeat the statutory language, they "give[ ] little or no instruction on a central issue in this case." Gonzales, 546 U.S. at 257, 126 S. Ct. at 915.

The DOL "does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." Id. 546 U.S. at 257, 126 S. Ct. at 916. Instead, the DOL's current interpretation in the *amicus* brief is "entitled to respect" only to the extent it has the "power to persuade." Id. at 256, 126 S. Ct. at 915 (quoting Skidmore v. Swift & Co., 323 .S. 134, 65 S. Ct. 161 (1944)). We find the DOL's interpretation unpersuasive.

According to the DOL, "a 'sale' for the purposes of the outside sales exemption *requires a consummated transaction* directly involving the employee for whom the exemption is sought." DOL brief at 11 (emphasis added). This language, however, is inconsistent with the statutory definition which provides that a "sale" includes not only a "sale" as that term is traditionally defined, but also "other disposition." 29 U.S.C. § 203(k). Moreover, the DOL's attempt to now constrict and limit the statutory definition to "actual sales," DOL brief at 5, 10, is contrary to the DOL's previous interpretations that broadly defined the outside sales exemption as requiring a sale "in some sense." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004).

Not only is the DOL's current interpretation inconsistent with the statutory language

and its prior pronouncements, but it also defies common sense. Pharmaceutical sales representatives are salespeople. They make sales the way that sales are made in the pharmaceutical industry. Any other construction ignores reality and defeats the spirit and purpose of the exemption. Under the DOL's interpretation, there are no salespersons in the pharmaceutical industry. This would come as a great surprise to the physicians of this country whose waiting rooms are filled with drug sales reps and the millions of television viewers who are bombarded with drug advertising every time the set is turned on. But because title under the Uniform Commercial Code passes at the drugstore, under the DOL view, the drugstore clerk is the salesperson. We reject this absurdity.

IT IS ORDERED DENYING plaintiffs' motion to alter or amend the judgment (doc. 96).

DATED this 29th day of January, 2010.

Frederick J. Martone

Frederick J. Martone
United States District Judge

APPENDIX D - Order of the United States Court of Appeals for the Ninth Circuit on Petition for Panel Rehearing and for Rehearing En Banc

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10-15257

MICHAEL SHANE CHRISTOPHER and FRANK BUCHANAN, *Plaintiffs-Appellants,*

v.

SMITHKLINE BEECHAM OPINION CORPORATION, DBA GlaxoSmithKline,
Defendant-Appellee.

Filed May 17, 2011

Order of the Court

Before: SCHROEDER, TALLMAN, and M. SMITH, Circuit Judges.

The panel has unanimously voted to deny Appellants' petition for panel rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

APPENDIX E – Relevant Statutory and Regulatory Provisions

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29 U.S.C. § 207(a) (Maximum hours)

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

(2) No employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, and who in such workweek is brought within the purview of this subsection by the amendments made to this chapter by the Fair Labor Standards Amendments of 1966--

(A) for a workweek longer than forty-four hours during the first year from the effective date of the Fair Labor Standards Amendments of 1966,

(B) for a workweek longer than forty-two hours during the second year from such date, or

(C) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 213(a) (Exemptions)

(a) Minimum wage and maximum hour requirements

The provisions of section 206 (except subsection (d) in the case of paragraph (1) of this subsection) and section 207 of this title shall not apply with respect to--

(1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of subchapter II of chapter 5 of Title 5, except that an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities); or

(2) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(3) any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center, if (A) it does not operate for more than seven months in any calendar year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year, except that the exemption from sections 206 and 207 of this title provided by this paragraph does not apply with respect to any employee of a private entity engaged in providing services or facilities (other than, in the case of the exemption from section 206 of this title, a private entity engaged in providing services and facilities directly related to skiing) in a national park or a national forest, or on land in the National Wildlife Refuge System, under a contract with the Secretary of the Interior or the Secretary of Agriculture; or

(4) Repealed. Pub.L. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939

(5) any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life, or in the first processing, canning or packing such marine products at sea as an incident to, or in conjunction with, such fishing operations, including the going to and returning from work and loading and unloading when performed by any such employee; or

(6) any employee employed in agriculture (A) if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor, (B) if such employee is the parent, spouse, child, or other member of his employer's immediate family, (C) if such employee (i) is employed as a hand harvest laborer and is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) commutes daily from his permanent residence to the farm on which he is so employed, and (iii) has been employed in agriculture less than thirteen weeks during the preceding calendar year, (D) if such employee (other than an employee described in clause (C) of this subsection) (i) is sixteen years of age or under and is employed as a hand harvest laborer, is paid on a piece rate basis in an operation which has been, and is customarily and generally recognized as having been, paid on a piece rate basis in the region of employment, (ii) is employed on the same farm as his parent or person standing in the place of his parent, and (iii) is paid at the same piece rate as employees over age sixteen are paid on the same farm, or (E) if such employee is principally engaged in the range production of livestock; or

(7) any employee to the extent that such employee is exempted by regulations, order, or certificate of the Secretary issued under section 214 of this title; or

(8) any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto; or

(9) Repealed. Pub.L. 93-259, § 23(a)(1), Apr. 8, 1974, 88 Stat. 69

(10) any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations; or

(11) Repealed. Pub.L. 93-259, § 10(a), Apr. 8, 1974, 88 Stat. 63

(12) any employee employed as a seaman on a vessel other than an American vessel; or

(13), (14) Repealed. Pub.L. 93-259, §§ 9(b)(1), 23(b)(1), Apr. 8, 1974, 88 Stat. 63, 69

(15) any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary); or

(16) a criminal investigator who is paid availability pay under section 5545a of Title 5; or

(17) any employee who is a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker, whose primary duty is--

> **(A)** the application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software, or system functional specifications;
>
> **(B)** the design, development, documentation, analysis, creation, testing, or modification of

computer systems or programs, including prototypes, based on and related to user or system design specifications;

(C) the design, documentation, testing, creation, or modification of computer programs related to machine operating systems; or

(D) a combination of duties described in subparagraphs (A), (B), and (C) the performance of which requires the same level of skills, and

who, in the case of an employee who is compensated on an hourly basis, is compensated at a rate of not less than $27.63 an hour.

29 C.F.R. § 541.500 (General rule for outside sales employees)

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

29 C.F.R. § 541.501 (Making sales or obtaining orders)

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

29 C.F.R. § 541.502 (Away from employer's place of business)

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (i.e., one or two weeks) should not be considered as the employer's place of business.

29 C.F.R. § 541.503 (Promotion work)

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

APPENDIX F – Brief for the Secretary of Labor as *Amicus Curiae* in support of Plaintiffs-Appellants, filed in the United States Court of Appeals for the Ninth Circuit

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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 10-15257

MICHAEL SHANE CHRISTOPHER and FRANK BUCHANAN, *Plaintiffs-Appellants*,

v.

SMITHKLINE BEECHAM OPINION CORPORATION, DBA GlaxoSmithKline,
Defendant-Appellee.

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Filed August 10, 2011

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Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants. The district court committed legal error when it concluded that the Plaintiffs-Appellants, who were employed as pharmaceutical sales representatives ("Reps"), are exempt from the overtime requirements of the Fair Labor Standards Act ("FLSA" or "Act") under the "outside sales" exemption. *See* 29 U.S.C. 213(a)(1).

STATEMENT OF INTEREST OF THE SECRETARY OF LABOR

The Secretary administers and enforces the FLSA and has a strong interest in ensuring that it is interpreted correctly in order to ensure that all employees receive the wages to which they are entitled. *See* 29 U.S.C. 204(a) and (b), 211(a), 216(c) and 217. She is thus necessarily interested in the correct interpretation of the exemptions to the Act's overtime requirements.

Under the Department of Labor's ("Department") regulations, the Reps do not meet the requirements for the outside sales exemption. The Reps do not sell or take orders for defendant SmithKline Beecham d/b/a GlaxoSmithKline's ("GSK") drugs;[15] rather, they provide information to target physicians about GSK's drugs with the goal of persuading the physicians to prescribe those drugs to their patients. The actual sale of drugs takes place between GSK and pharmacies. Although the Reps' duties bear some of the indicia of sales -- they use methods of persuasion similar to those of salespersons, they receive some of their compensation in the form of incentive compensation, and their promotion work affects GSK's actual drug sales -- the fact that the Reps do not actually "make sales" conclusively demonstrates that the position is not that of an outside salesperson consistent with the Department's legislative rules.

By concluding that the Reps are exempt as outside salespersons despite the fact that they do not engage in any sales, the district court failed to follow the Department's regulatory provisions limiting the outside sales exemption to employees who make sales or obtain orders or contracts for services for which a consideration will be paid by the client or customer. *See* 29 C.F.R. 541.500.

STATEMENT OF THE ISSUES

1. Whether the district court erred by concluding that the Reps are exempt outside salespersons, despite the fact that they do not "make sales" as

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[15] The district court's rulings spell the defendant's name as "SmithKlein" and "GlaxoSmithKlein." The defendant's name, however, is properly spelled "SmithKline" and "GlaxoSmithKline."

required by the Department's "outside sales" regulations.

2. Whether the district court erred by failing to accord the Department's regulations or, alternatively, its interpretations of those regulations, controlling deference.

STATEMENT OF THE CASE

1. The Reps were employed by GSK and were tasked with marketing and promoting GSK products to physicians. *See Christopher v. SmithKline Beecham Corp.*, No. CV-08-1498-PHX-FJM, 2009 WL 4051075, at *1 (D. Ariz. Nov. 20, 2009). They were responsible for visiting physicians in their assigned territory, and discussing the features, benefits, and risks of GSK products. *Id.* at *2. GSK provided Reps with training, as well as with detailed reports on the physicians to be visited. *Id.*

A Rep's goal is to "close" each physician visit by requesting a non-binding committing from the physician to prescribe the Rep's assigned product. *Christopher*, 2009 WL 4051075, at *5. This non-binding commitment is the most a Rep can achieve at each physician visit, as the Food and Drug Administration prohibits pharmaceutical companies, and by extension Reps, from selling drugs to physicians or patients. *Id.* at *3-*5. Patients are the ultimate consumer, and must obtain prescriptions from physicians and then purchase the prescribed drugs at pharmacies. *Id.* at *3. Because it is not possible to directly link Reps' marketing and promotional activities to individual patients filling prescriptions, incentive compensation, which comprised about 26-41% of the Reps' total compensation, was partially based upon the number of prescriptions written by physicians in the Reps' assigned territories. *Id.* at *2-*3.

2. The Reps brought an action in district court alleging that GSK violated the FLSA by failing to pay overtime compensation. *See Christopher,* 2009 WL 4051075, at *1. On November 20, 2009, the district court granted summary judgment to GSK. The court concluded that "because plaintiffs plainly and unmistakably fit within the terms and spirit of the exemption, we conclude that they are exempt employees under the outside sales exemption." *Id.* at *5. While acknowledging that various courts had reached differing conclusions regarding the application of the exemption to Reps, the court concluded that Reps "engage[] in what is the functional equivalent of an outside salesperson and to hold otherwise is to ignore reality in favor of form over substance." *Id.* at *4-*5. The district court supported this conclusion by relying on the fact that the Reps are not hourly workers and do not punch a clock, that the Reps' work is largely unsupervised, and that bonuses are paid in lieu of overtime. *Id.* at *5. The court also noted that "[t]he statute and supporting regulations defining the outside sales exemption were adopted in 1938, long before the development of the pharmaceutical sales industry, and few clarifications or changes have been enacted since then." *Id.* Because it had determined that the Reps were exempt pursuant to the outside sales exemption, the court declined to address the applicability of the administrative exemption, although the parties had briefed that issue as well.

3. Prior to the court's ruling on the summary judgment motions, the Reps filed a Notice of Supplemental Authority, submitting the *amicus*

curiae brief ("DOL brief") that the Secretary had filed in a case before the Second Circuit, *In re Novartis Wage & Hour Litigation,* No. 09-0437-cv, 2010 WL 2667337 (2d Cir. July 6, 2010). *See* Docket No. 91, Notice of Supplemental Authority. The DOL brief articulated the Department's position that the outside sales exemption does not apply to pharmaceutical sales representatives. However, the court did not address the DOL brief in its summary judgment ruling. The Reps subsequently filed a motion to alter or amend judgment pursuant to Fed. R. Civ. P. 59(e), requesting that the court reconsider its decision based on deference owed to the DOL brief. *See* Docket No. 96, Motion to Alter or Amend Judgment.

By order dated February 1, 2010, the court denied the Reps' motion, concluding that the DOL brief was not entitled to deference under either *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), or *Auer v. Robbins*, 519 U.S. 452 (1997). The court concluded that "[n]ot only is the DOL's current interpretation inconsistent with the statutory language and its prior pronouncements, but it also defies common sense." *See Christopher v. SmithKline Beecham Corp.,* 2010 WL 396300, at *2 (D. Ariz. Feb. 1, 2010). This appeal followed.

ARGUMENT

I. THE DISTRICT COURT ERRED BY CONCLUDING THAT THE REPS ARE EXEMPT OUTSIDE SALESPERSONS DESPITE THE FACT THAT THEY DO NOT "MAKE SALES" AS REQUIRED BY THE DEPARTMENT'S "OUTSIDE SALES" REGULATIONS

1. Section 13(a)(1) of the FLSA provides a complete exemption from the overtime pay requirement for "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman[,] as such terms are defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. 213(a)(1). Thus, Congress has never defined the term "outside salesman." *See* 69 Fed. Reg. 22,122, 22,123 (Apr. 23, 2004). Rather, pursuant to Congress's expressly delegated rulemaking authority, the Secretary issued regulations after notice and comment that "define and delimit" the FLSA's overtime exemptions. *See* 69 Fed. Reg. at 22,122. The Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *see Cleveland v. City of Los Angeles*, 420 F.3d 981, 988 (9th Cir. 2005), *cert. denied*, 546 U.S. 1176 (2006).

The Department's regulations define the statutory phrase "outside salesman" as including "any employee . . . [w]hose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. 541.500(a)(1)(i)-(ii).[16] "Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29

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[16] It is undisputed that the Reps are "customarily and regularly engaged away from" GSK's place of business. 29 C.F.R. 541.500(a)(2).

C.F.R. 541.700(a), and section 3(k) of the FLSA defines "[s]ale" as including "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k); *see* 29 C.F.R. 541.501. The Department's regulations further explain that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property," and that "'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. 541.501(b) and (d).

The regulations explicitly distinguish promotional work from exempt outside sales work, clarifying that

> [p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.

29 C.F.R. 541.503(a). In other words, "[p]romotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." 29 C.F.R. 541.503(b).

Thus, under the Department's regulations, the Reps do not meet the primary duties test for the outside sales exemption.[17] Because the Reps do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe GSK drugs to their patients when appropriate, they do not meet the regulations' requirement that their primary duty must be "making sales." 29 C.F.R. 541.500(a)(1)(i). Contrary to the district court's assertion that Reps "engage[] in what is the functional equivalent of an outside salesperson", *Christopher*, 2009 WL 4051075, at *5, the actual sale of GSK drugs occurs between the company and distributors (and then to the pharmacy). Insofar as the Reps' work increases GSK sales, it is non-exempt promotional work "designed to stimulate sales that will be made by someone else." 29 C.F.R. 541.503(b). As a district court recently concluded, "[t]he regulations *dictate* that if an employee does not make any sales and does not obtain any orders or contracts, then the outside sales exemption does not apply." *Jirak v. Abbott Labs., Inc.*, -- F. Supp. 2d --, No. 07-C-3626, 2010 WL 2331098, at *6 (N.D. Ill. June 10, 2010) (emphasis added).

2. To the extent that there is any ambiguity in the Department's regulations, the Department's Preamble to the 2004 final rule ("Preamble"), Wage

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[17] "A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations." 29 C.F.R. 541.2. Therefore, contrary to the district court's suggestion in *Christopher*, 2009 WL 4051075, at *3, the fact that the Reps' "job descriptions and job duties . . . incorporate standard sales training and methodology" is not in any way dispositive.

and Hour Division ("WH") opinion letters, and WH Field Operations Handbook (1965) ("FOH") provide additional guidance. The Preamble emphasizes that the Department "does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services." 69 Fed. Reg. at 22,162. "Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." *Id.* The Preamble further notes that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Id.* Indeed, the exemption does not extend to employees engaged in paving the way for salesman or assisting retailers. *Id.* "'In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.'" 69 Fed. Reg. at 22,162–22,163 (quoting Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 83 (June 30, 1949)).

In this case, it is undisputed that Reps are unable to obtain any sort of "commitment to buy" from the physician; they are in fact prohibited from doing so.

See Novartis, 2010 WL 2667337, at *12 ("The type of 'commitment' the Reps seek and sometimes receive from physicians is not a commitment 'to buy' and is not even a binding commitment to prescribe."). Nor can a Rep consummate his or her own specific sale. GSK is unable to link a Rep's marketing activities to a patient filling a prescription; thus, Reps cannot be directly credited with the sale. Due to this inability to credit Reps with specific sales, Reps' incentive compensation is based in part on the number of prescriptions written by the physicians in their territories, as well as a variety of other factors. As the Incentive Compensation Information & Governance Manager for GSK explains, incentive compensation is designed to reward Reps for meeting "*various* goals" that are designed to incentivize Reps to achieve objectives GSK determines are important. *See* Pellegrino Dec. at SER 0621-0622 (emphasis added). This incentive compensation is awarded using a "*number of* different approaches" and it "can, and regularly does, *change* from quarter to quarter." *Id.* at SER 0622 (emphases added). Furthermore, the Department's Wage and Hour Division has consistently reiterated its position that a "sale" for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.[18] For example, the Wage and Hour Division rejected the application of the outside sales exemption to individuals soliciting charitable contributions, noting that "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption. . . . [These] solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid." WH Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 26, 2006); *see* WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994) (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations). Additionally, the Department's FOH states that "[a]n employee whose duty is to convince a dealer of the value of his employer's service to the dealer's customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k)." FOH § 22e04.

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[18] In the context of addressing the "retail or service establishment" criteria of the FLSA's section 7(i) exemption, *see* 29 U.S.C. 207(i), Wage and Hour noted when discussing the definition of "sale" in section 3(k) of the FLSA that "[t]hough the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold." WH Opinion

3. In concluding that the Reps are exempt as outside salespersons, the district court in this case relied in part on *In re Novartis Wage & Hour Litigation*, 593 F. Supp. 2d 637 (S.D.N.Y. 2009), a case with nearly identical facts as the instant case. *See Christopher*, 2009 WL 4051075, at *4.[19] However,

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Letter FLSA 2005-06, 2005 WL 330605 (Jan. 7, 2005) (internal quotation marks and citation omitted).

[19] This Court has not addressed the question whether Reps are exempt as outside salespersons. Currently before this Court are at least two other cases in which the District Court for the Central District of California concluded that Reps are exempt

the district court's ruling in *Novartis* has since been reversed by the Second Circuit. On July 6, 2010, the Second Circuit ruled in favor of the Reps, concluding that the district court did not properly apply the outside sales or administrative exemptions. The Second Circuit explained that the Secretary's regulations "define and delimit the terms used in the statute; that under those regulations as interpreted by the Secretary, the Reps are not outside salesmen or administrative employees; and that the Secretary's interpretations are entitled to 'controlling' deference." *Novartis*, 2010 WL 2667337, at *7 (citation omitted). The court concluded that the Department's regulations "make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale." *Id.* at *11. In concluding that the Reps are not exempt under the outside sales exemption, the Court noted

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as outside salespersons under the FLSA. *See Yacoubian v. Ortho-McNeil Pharm., Inc.*, SACV 07-00127-CJC(MLGx), 2009 WL 3326632 (C.D. Cal. Feb. 6, 2009), appeal docketed, No. 09-55229 (9th Cir. Feb. 11, 2009); *Delgado v. Ortho-McNeil, Inc.*, SACV 07-00263-CJC(MLGx), 2009 WL 2781525 (C.D. Cal. Feb. 6, 2009), appeal docketed, No. 09-55225 (9th Cir. Feb. 11, 2009). These cases have been consolidated with the instant appeal for oral argument purposes only. In addition, in *D'Este v. Bayer Corp.*, 565 F.3d 1119 (9th Cir. 2009), this Court certified to the California Supreme Court the question whether the District Court for the Central District of California correctly concluded that Reps are exempt outside salespersons under California state law; the underlying district court decision relied in part on the interpretation of the FLSA's requirements. The California Supreme Court denied the request for certification.

that "the interpretation of the regulations given by the Secretary in her position as *amicus* on this appeal is entirely consistent with the regulations." *Id.* The Second Circuit's summary is instructive:

> In sum, where the employee promotes a pharmaceutical product to a physician but can transfer to the physician nothing more than free samples and cannot lawfully transfer ownership of any quantity of the drug in exchange for anything of value, cannot lawfully take an order for its purchase, and cannot lawfully even obtain from the physician a binding commitment to prescribe it, we conclude that it is not plainly erroneous to conclude that the employee has not in any sense, within the meaning of the statute or the regulations, made a sale.

Id. at *13. Finally, the Second Circuit stated that "[t]o the extent that the pharmaceuticals industry wishes to have the concept of 'sales' expanded to include the promotional activities at issue here, it should direct its efforts to Congress, not the courts." *Id.*

The district court in the instant case also relied upon *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941). However, the facts of *Jewel Tea* only serve to highlight the differences between properly exempt outside salespersons and the Reps in this case. In *Jewel Tea*, the Tenth Circuit considered whether door-to-door salesmen selling assorted merchandise were exempt under the FLSA's outside sales exemption. In concluding that the salesmen were exempt, the court noted that the employees had "no restrictions" on the time they worked, that they could earn as much or as little as "ambition" dictates, and that their commissions were based on the total amount of goods sold. *Id.* at 207-08. Here, the Reps were expected to be visiting physician offices between the hours of 8:30 a.m. and 5:00 p.m. every day, and their compensation generally consisted of approximately 75% base salary, and 25% incentive compensation, which was not a straight commission but rather based on multiple factors, as discussed *supra*. *See Christopher*, 2009 WL 4051075, at *3.

Most critically, the *Jewel Tea* employees plainly sold a variety of merchandise to their customers, with their days comprised of a series of consummated transactions. By contrast, Reps engage in a series of promotional meetings with physicians, never conducting any consummated transactions. As subsequently noted by the Tenth Circuit in *Clements v. Serco, Inc.*, 530 F.3d 1224 (10th Cir. 2008), "[t]he touchstone for making a sale, under the [Department's regulations], is obtaining a commitment." *Id.* at 1227 (concluding that civilian military recruiters are not within the outside salesperson exemption even though they "engaged in sales training and 'sold' the idea of joining the Army to potential recruits," because they did not engage in sales work as defined by the Department's regulations).

4. Finally, GSK's attempt to deflect attention from the outside sales exemption — the very crux of this case – by focusing on the statutory definition of "[s]ale," which includes the terms "consignment for sale" and "other disposition." 29 U.S.C. 203(k), is unpersuasive.[20]6 The term "other disposition" must

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[20] GSK's reliance on *Gieg v. DDR, Inc.*, 407 F.3d 1038 (9th Cir. 2005), is similarly misplaced. In *Gieg*, a case which does not

be read in the context of the language that precedes it, i.e., in the context of making some kind of a sale. It must also be read in the context of the outside salesman exemption regulations themselves, which the Department promulgated pursuant to explicit congressional authorization and after notice and comment. *See* 29 U.S.C. 213(a)(1); 69 Fed. Reg. at 22,122. Indeed, the regulations require that an "other disposition" must be, in some sense, a sale. *See* 69 Fed. Reg. at 22,162 (Preamble) ("An employer cannot meet this requirement [that the primary duty consists of makes sales or obtaining orders or contracts for services] unless it demonstrates objectively that the employee, in some sense, has made sales."). The most the Reps can obtain is a non-binding commitment from a physician to prescribe GSK drugs as appropriate. As the Second Circuit has explained, "[a]lthough the phrase 'other disposition' is a catch-all that could have an expansive connotation, we see no error in the regulations' requirement that any such 'other disposition' be 'in

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involve the outside sales exemption, the court concluded that for purposes of determining whether other car dealerships qualified as retail or service establishments under section 7(i) of the FLSA, 29 U.S.C. 207(i), individual automobile leases were "sales" that were not "for resale" and proceeds from those leases could be counted toward dealerships' annual dollar volume. *See* 407 F.3d at 1049. In *Gieg*, however, the court explicitly noted that "[t]he customer who signs a retail automobile lease is the intended consumer of that vehicle." *Id.* There is no such correlation in the instant case. There is no binding commitment between the Rep and physician, as there is between a customer and the dealership when entering into an automobile lease. The physician is not the "intended consumer" of the drugs; rather, as discussed *supra*, it is patients that ultimately purchase GSK products from pharmacies.

some sense a sale.'" *Novartis*, 2010 WL 2667337, at *11. The Second Circuit thus concluded that "[s]uch an *ejusdem generis*-type interpretation[21] is consistent with the interpretive canon that exemptions to remedial statutes such as the FLSA are to be read narrowly, and is neither erroneous nor unreasonable." *Id.* (citations omitted).

II. THE DISTRICT COURT ERRED BY NOT ACCORDING THE DEPARTMENT'S REGULATIONS OR, ALTERNATIVELY, ITS INTERPRETATIONS OF THOSE REGULATIONS, CONTROLLING DEFERENCE

By order dated February 1, 2010, the district court denied the Reps' motion to alter or amend the judgment, concluding that the DOL amicus brief submitted in the *Novartis* case was not entitled to deference under either *Chevron* or *Auer*, both of which set forth highly deferential standards. *See Christopher*, 2010 WL 396300, at *2. The district court further concluded that the Department's regulations "only marginally expound upon the statutory definition" and "largely repeat the statutory language." *Id.* at *1. By failing to give the highest level of deference to the Department's regulations or, alternatively, to its interpretation of those regulations, as set out in the Preamble, WH opinion letters and FOH, and the DOL brief, the district court committed error.[22]

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[21] "Ejusdem generis" is "[a] canon of construction holding that when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed." Black's Law Dictionary 594 (9th ed. 2009).

Although Congress included the outside sales exemption in enacting the FLSA in 1938, it provided no definitions, guidance, or instructions as to its meaning. *See* 69 Fed. Reg. at 22,123. Rather than define the section 13(a)(1) exemptions in the statute, Congress granted the Secretary of Labor broad authority to "define and delimit" these terms "from time to time by regulations." 69 Fed. Reg. at 22,123. A unanimous Supreme Court reaffirmed the broad nature of this delegation in *Auer,*519 U.S. at 456, stating that the "FLSA grants the Secretary broad authority to 'defin[e] and delimi[t]' the scope of the exemption for executive, administrative and professionals employees." *See Spradling* v. *City of Tulsa*, 95 F.3d 1492, 1495 (10th Cir. 1996) (the Department "is responsible for determining the operative definitions of these terms through interpretive regulations"), *cert. denied*, 519 U.S. 1149 (1997); *Dalheim* v. *KDFW–TV*, 918 F.2d 1220, 1224 (5th Cir. 1990) (the FLSA "empowers the Secretary of Labor"' to define by regulation the terms executive, administrative, and professional). The regulations promulgated pursuant to this express delegation of authority by Congress, and after notice and comment (i.e. legislative rules), are entitled to controlling deference. *See Chevron,* 467 U.S. at 843-44; *see also Long Island Care at Home, Ltd. v. Coke,* 551 U.S. 158, 165-68, 171-74 (2007); *National Cable*

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[22] The Secretary recognizes that the district court was specifically addressing the deference to be accorded to her amicus brief's interpretation of the regulations. However, the broader issue of deference to Secretary's regulations was also necessarily before the court.

& Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980 (2005); *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

The Department's regulations provide substantial detail as to the definition and application of the exemption. Those regulations define the statutory phrase "outside salesman," discuss the primary duty of an outside salesman, define "primary duty," and expound upon what constitutes outside sales work. *See* 29 C.F.R. 541.500(a)(1), 29 C.F.R. 541.700, 29 C.F.R. 541.501. The regulations further explain the exemption by distinguishing promotional work related to sales made by other individuals from sales qualifying for the outside sales exemption. *See* 29 C.F.R. 541.503(a). As such, contrary to the district court's conclusion, the Department's regulations addressing this exemption do far more than merely "parrot" the language of the FLSA. *See, e.g., Harrell v. U.S. Postal Serv.*, 445 F.3d 913, 925 (7th Cir. 2006) ("[T]he regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case."); *Jirak*, 2010 WL 2331098, at *6 ("The regulations . . . go further and provide guidance directly applicable to the issue in this case: when the outside sales exemption applies.").[23]9 In fact, the regulations themselves lead to the conclusion that the Reps' promotional work does not qualify for the outside sales exemption.

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[23] *Gonzales v. Oregon*, 546 U.S. 243 (2006), which the district court cited in support of not according deference, is inapposite as applied to the Department's regulations for several reasons. As discussed *supra*, the Secretary promulgated the regulations pursuant to an express delegation by Congress. In addition, the regulations here do more than simply restate the terms of the statute itself.

To the extent that the plain language of the Department's outside sales or administrative regulations are deemed to be ambiguous, courts must give controlling deference to the Department's interpretation of its own regulations unless such interpretation is plainly erroneous or inconsistent with those regulations. *See Federal Express Corp. v. Holowecki*, 552 U.S. 389, 397 (2008); *Auer*, 519 U.S. at 461. This principle holds true whether the Secretary's interpretation is found in a Preamble to a final rule published in the Federal Register, an opinion letter or other interpretive materials, or a legal brief. *See, e.g., Coke*, 551 U.S. at 171 (controlling deference to Department's Advisory Memorandum issued during the course of litigation); *Auer*, 519 U.S. at 462 (controlling deference to legal brief); *cf. Disability Law Ctr., Inc. v. Anchorage Sch. Dist.*, 581 F.3d 936, 939-40 (9th Cir. 2009) ("Where an agency is tasked with administering a statute, we defer to its interpretation of the statute so long as the statute itself is silent or ambiguous on the issue and the agency's interpretation is not arbitrary or capricious. An agency's interpretation expressed in an amicus brief receives the same deference.") (citing *Chevron*, 467 U.S. at 842-43, and *Hertzberg v. Dignity Partners, Inc.*, 191 F.3d 1076, 1082 (9th Cir. 1999), which in turn cites to *Auer*, 519 U.S. at 462). Accordingly, the district court's conclusion that the DOL brief that had been filed in the *Novartis* case was not entitled to any deference constituted error. The DOL brief, together with the WH opinion letters and FOH, is entitled to controlling deference to the extent the regulations themselves are not found to be controlling. *See Jirak*, 2010 WL 2331098, at *7 ("[P]ursuant to both the plain text of the outside sales exemption and the DOL's interpretation of it, Representatives fail to satisfy the primary duty test of the exemption because they do not 'make sales' under the statute.").[24]

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and conclude that the outside sales exemption does not apply to the Reps in this case.

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[24] In addition to the outside sales exemption, the parties also briefed the applicability of the administrative exemption before the district court. *See* 29 U.S.C. 213(a)(1). However, the district court declined to address the applicability of this exemption. It is the Secretary's position that the Reps are not exempt under the administrative exemption, as they do not exercise discretion and independent judgment with respect to matters of significance. Under the Department's administrative exemption regulations, an "employee employed in a bona fide administrative capacity" means "any employee . . . [w]hose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers[] and . . . [w]hose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. 541.200(a)(2)-(3). The requirement that the employee's primary duty include the exercise of discretion and independent judgment "involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term 'matters of significance' refers to the level of importance or consequence of the work performed." 29 C.F.R. 541.202(a). Although Reps work independently (i.e., without direct supervision), determine what time of day to visit the physicians on their lists, and decide how best to execute their presentations within clearly prescribed parameters, this does not suffice to qualify for the administrative exemption. The Reps do not perform any primary duties that are largely comparable to those found in 29 C.F.R. 541.202(b), such as formulating or implementing management policies, utilizing authority to deviate from established policies, providing expert advice, or planning business objectives.

Respectfully submitted,
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RESPONDENT'S BRIEF

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Supreme Court, U.S.
FILED

OCT 17 2011

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No. 11-204

In the
Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
AND FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A, GLAXOSMITHKLINE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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October 17, 2011

QUESTIONS PRESENTED

During most of the more than 70 years since enactment of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, pharmaceutical companies have employed pharmaceutical sales representatives and, consistent with Department of Labor regulations first promulgated in 1940 and reaffirmed as recently as in 2004 defining the term "sales" broadly, classified those sales representatives as exempt from the FLSA's overtime pay requirements under the "outside sales" exemption, 29 U.S.C. § 213(a)(1). In 2009, the Department began filing *amicus* briefs in private civil litigation announcing its new position that sales representatives are not now and have never been exempt because they do not "sell" as that term is defined in Section 3(k) of the FLSA, 29 U.S.C. § 203(k). The United States Court of Appeals for the Ninth Circuit refused to defer to that abrupt change in position and held that sales representatives are exempt. The two questions presented in the Petition are:

(1) Whether deference is owed to the Secretary's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

PARTIES TO THE PROCEEDINGS

Petitioners, Michael Shane Christopher and Frank Buchanan, were the appellants in the court below. Respondent SmithKline Beecham Corp. d/b/a/ GlaxoSmithKline, now known as GlaxoSmithKline LLC, was the appellee in the court below.

RULE 29.6 STATEMENT

Respondent SmithKline Beecham Corporation, d/b/a GlaxoSmithKline, now known as GlaxoSmithKline LLC, is a wholly-owned subsidiary of GlaxoSmithKline Holdings (Americas), Inc. All of Respondent's stock is owned by GlaxoSmithKline Holdings (Americas), Inc. GlaxoSmithKline plc is the ultimate parent of both Respondent and GlaxoSmithKline Holdings (Americas), Inc., the shares of which are publicly traded on the London Stock Exchange and the New York Stock Exchange. No person beneficially owns 10% or more of the outstanding shares of GlaxoSmithKline plc.

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BRIEF FOR RESPONDENT

Respondent SmithKline Beecham Corporation d/b/a GlaxoSmithKline, now known as GlaxoSmithKline LLC ("GSK"), respectfully acquiesces in the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 635 F.3d 383 and is reproduced at Pet.App.1a–36a.[1] The opinion of the District Court granting respondent's motion for summary judgment is unreported but is available at 2009 WL 4051075 and is reproduced at Pet.App.37a–47a. The opinion of the District Court denying Petitioners' motion to amend or alter judgment also is unreported but is available at 2010 WL 396300 and is reproduced at Pet.App.48a–52a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit rendered its decision on February 14, 2011. A petition for panel rehearing and rehearing en banc was denied on May 17, 2011. Pet.App.53a. A timely petition for certiorari was filed on August 12, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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[1] "Pet.App." refers to the Petition Appendix.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Most of the pertinent statutory and regulatory provisions are set forth in the Petition and Petition Appendix. Pet.1–3; Pet.App.54a–63a. In addition to those provisions, the Department of Labor's ("DOL's") interpretation at 29 C.F.R. § 779.241 (1970) is pertinent and provides:

> The statutory definition of the term "sale" or "sell" is quoted in § 779.15. As long as the employee in any way participates in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, in a practical sense is an essential part of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods. "Selling" goods, under section 3(s) has reference only to goods which "have been moved in or produced for commerce by any person," as discussed in §§ 779.242 and 779.243.

INTRODUCTION

The Petition in this case explains that the Circuits are split over both the specific treatment of pharmaceutical sales representatives ("PSRs") under the Fair Labor Standards Act ("FLSA") and the meaning of the term "sales" in Section 3(k) of the FLSA and the broader question of the proper deference to an agency's views when it uses an *amicus* brief to alter a longstanding position and fails even to acknowledge the change. The Petition further explains that the issues here—the proper classification of tens of thousands of PSRs across the country and the proper judicial reaction to an agency's effort to reverse a longstanding administrative construction of a statute in an *amicus* brief—are of surpassing importance. The Petition also contends that the decision below is incorrect. Petitioners are correct about the first two points—the courts are divided and the issues are critically important—but wrong about the third.

The decision below correctly rejected an effort to overturn the longstanding consensus that the outside sales force of the pharmaceutical industry qualified for the FLSA's "outside sales" exemption, notwithstanding the novel position to the contrary taken by the Secretary in an *amicus* brief. The decision below also correctly refused to afford any deference, much less "controlling deference" under *Auer*, to the Secretary's abrupt departure from DOL's long-standing position and flexible interpretation of the term "sales," a departure that was neither acknowledged nor explained. Indeed, the Ninth Circuit appropriately recognized that the Second Circuit's extreme deference to DOL in its *Novartis* case[2] would allow agencies to circumvent the rulemaking process and to regulate by *amicus* brief.

Nonetheless, even though the decision below is correct, the issues are important, the Circuits are badly divided, and Respondent and the pharmaceutical industry more broadly need a clear and uniform answer to the questions presented. Accordingly, Respondent acquiesces in the petition for certiorari.

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[2] *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

STATEMENT OF THE CASE

1. DOL's earliest regulations concerning the outside sales exemption provided that an "outside salesman" is one in pertinent part "[w]ho is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in (1) Making sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5(a) (1940).[3] Section 3(k) defined "sale" in broad and flexible terms to "*include[ ]* any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." 29 U.S.C. § 203(k) (emphasis added). And DOL emphasized the flexible, nonrestrictive manner in which Congress had defined "sales" in Section 3(k) by explaining that an employee engages in such "sales" whenever the employee has "in some sense ma[d]e a sale." Dep't of Labor, Wage & Hour Div., "*Executive, Administrative, Professional . . . Outside Salesman" Redefined: Report and Recommendation of the Presiding Officer at Hearings Preliminary to Redefinition* 46 (Oct. 10, 1940) ("Stein Report").

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[3] The current regulations are little changed, defining an "outside salesman" as one in pertinent part whose "primary duty" is "making sales within the meaning of section 3(k) of the Act" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a).

Thirty years later, DOL continued its flexible approach to "sales" under the Act with 29 C.F.R. § 779.241, entitled "Selling."[4] In interpreting the Section 3(k) definition of "sales," DOL again adopted an expansive, nonrestrictive, and practical position:

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, *in a practical sense* is an essential *part* of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods.

29 C.F.R. § 779.241 (1970) (emphasis added).

More recently, in its 2004 rulemaking, DOL emphasized that it "did not intend any substantive changes" and it in fact did not change its interpretation of the term "sales." *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 69 Fed. Reg. 22122, 22161–22162 (Apr. 23, 2004). To the contrary, DOL explained that the "framework of the existing Part 541 regulation is based upon the 1940 Stein Report" and other early DOL reports and noted that "much of the reasoning" of those reports "remains as relevant as ever." *Id.* at 22124. And DOL specifically reiterated its statement from the Stein Report that all that is required for the exemption to apply is that the employee "'*in some sense* make a sale.'" *Id.* at 22162.

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[4] Although § 779.241 addresses retailers, it interprets "[t]he statutory definition of the term 'sale' or 'sell' . . . quoted in § 779.15"—namely, 29 U.S.C § 203(k), the precise statutory definition at issue here. Congress provided that definitions in § 203 would apply uniformly throughout the FLSA. *See* 29 U.S.C. § 203 ("Definitions . . . [a]s used in this chapter").

Over the years, DOL has also provided other guidance and has approvingly quoted judicial decisions for the proposition that "the term 'sale' does *not* always have a fixed or invariable meaning," and must be defined contextually and in the totality of the circumstances presented. *See* Wage and Hour Opinion Letter FLSA 2005-6, 2005 WL 330605 (Dep't of Labor Jan. 7, 2005) (internal quotation marks omitted; emphasis added). Thus, DOL repeatedly and consistently directed employers and the courts to construe the term "sale" in a "practical," rather than a technical or restrictive manner.

That changed abruptly in 2009 when the Secretary of Labor filed an *amicus* brief in the Second Circuit's *Novartis* case. In that brief, without even acknowledging all it previously had said on the subject, DOL changed its interpretation of Section 3(k) and demanded deference for precisely the sort of "fixed [and] invariable" definition of sales that it had previously, explicitly rejected. Under DOL's entirely new and markedly more restrictive definition, a "sale" always, invariably, requires a fully "consummated transaction directly involving the employee for whom the exemption is sought."[5]

This radical change in position had a convulsive effect on the pharmaceutical industry in which a large outside sales force does not consummate physical transfers of product because of prescription requirements and other details of the regulatory environment. Indeed, according to DOL, the Novartis pharmaceutical sales representatives did not qualify for the exemption because they did not themselves personally, "actually," irrevocably, and fully consummate any transactions. The Second Circuit in *Novartis* gave this new interpretation controlling deference under this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). DOL filed a similar brief in this case, but the Court of Appeals disagreed both with DOL's novel construction of the statute and regulations and with the Second Circuit's conclusion that DOL's new position was entitled to deference.

2. Petitioners Christopher and Buchanan were employed by GlaxoSmithKline as PSRs. When they applied for this position, each understood that GSK preferred candidates who had previous sales experience.[6] The reason for this preference is plain:

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[5] Br. for Sec'y of Labor as *Amicus Curiae* in Supp. of Pls.-Appellants, at 11, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. Oct. 13, 2009) (No. 09-0437), *available at* http://www.dol.gov/sol/media/briefs/novartis(A)-10-13-09.pdf.

[6] Ninth Circuit Supplemental Excerpts of Record ("SER") 0028–0029 (Deposition of Michael Shane Christopher ("Christopher

the job description for the PSR position identifies as the incumbent's *first* "key responsibility" "[s]ell[ing] products to [a] specific customer market according to the business plan." SER 0108 (Christopher Dep. Ex. 1); SER 0302 (Buchanan Dep. Ex. 5). The "customers" who were the focus of the vast majority of PSRs' sales efforts were physicians—the only people authorized under federal law to write prescriptions for GSK products and therefore the only people who could get GSK products into the hands of patients with a medical need for them. Pet.App.2a–4a.

As PSRs, Petitioners were expected to use "customer-focused selling techniques" to meet or exceed the sales goals and objectives they received from the Company. SER 0034, 0036–0037 (Christopher Dep.). GSK expected them to "[d]evelop and deliver informative sales presentations based on customer needs," to "[d]evelop creative sales strategies to reach hard-to-see doctors/hard-to-work accounts," and, perhaps most importantly, to "[p]ositively impact sales in [their] territory." SER 0248–0249, 0302 (Buchanan Dep. & Dep. Ex. 5).

Even after starting their jobs at GSK, Petitioners received specialized training in sales skills.[7] Petitioners were trained to identify key customers;

Dep.")); SER 0246 (Deposition of Frank Buchanan ("Buchanan Dep.")).

[7] SER 0379–0382 (Declaration of William D. Curtin ("Curtin Decl.")); SER 0076-0077 (Christopher Dep.); 0265–0266 (Buchanan Dep.).

ask questions to engage customers in meaningful and appropriate discussions about GSK products; and unearth and resolve objections their customers might have to prescribing GSK products. And they were trained how to "close the sale,"—to ask for a commitment from their customer-physicians to prescribe GSK products for patients the doctors believed could benefit from them. SER 0380 (Curtin Decl.).

On the job, Petitioners did precisely what outside salespeople are expected to do. They did not work out of a GSK office; instead, they spent their time traveling to and visiting with their customers.[8] Before going on sales calls, they examined data regarding the prescribing habits of the doctors in their territories to see where they could gain new business or grow existing business.[9] They targeted physicians they believed could appropriately prescribe more GSK products and thus increase GSK's market share, and then tailored their sales approach for those physicians.[10] Each Petitioner had a different approach to engaging with physicians.[11] Each implemented GSK's "core messages" to suit his approach and selected the messages he thought would be most appropriate to use on each call.[12] GSK provided them with clinical aids to use on their sales calls, but Petitioners decided which of these aids to use and when, as well as which sales messages they would emphasize in each call.[13]

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[8] SER 0080–0081 (Christopher Dep.); SER 0290–0291 (Buchanan Dep.)

[9] SER 0128 (Christopher Dep. Ex. 18); SER 0229–0230, 0275–0277. 0296 (Buchanan Dep.); SER 0339 (Buchanan Dep. Ex. 15); SER 0343–0344 (Buchanan Dep. Ex. 16).

[10] SER 0181-0183 (Christopher Dep. Ex. 25); SER 0261–0265, 0288–0289 (Buchanan Dep.).

[11] SER 0068–0073. 0092–0093 (Christopher Dep.); SER 0355 (Buchanan Dep.).

Petitioners were evaluated on their sales techniques: their planning for each sales call; the degree to which they executed a persuasive sales presentation; and their success in "ask[ing] for the business" by seeking a commitment from physicians to prescribe GSK products for appropriate patients. On supervisor "ride-alongs" (which occurred every month or two), a manager would accompany each PSR in the field. The manager would then complete a Field Coaching Report that assessed the sales representative's competence with respect to GSK's "Winning Practices."[14] Other than these ride-alongs, however, each carried out daily work tasks independently, without in-person supervision, speaking with his manager about once a day.[15]

After being hired as salespeople for a job denominated as a sales job, being trained in sales techniques, and performing the duties of a salesperson, Petitioners were, not surprisingly, *paid* as salespeople. In addition to a fixed base salary, a significant portion of their total pay was contingent upon convincing the physicians on whom they called to write more prescriptions for GSK drugs for appropriate patients and thereby directly increasing sales within the territory.[16] Petitioners each received incentive compensation based on his success in increasing the market share and/or sales volume in his territory for the specific GSK products for which he was responsible.[17] Between 26% and 41% of Petitioners' total annual compensation during the relevant period was from incentive compensation.[18] GSK and Petitioners both understood that Petitioners' individual sales efforts directly led to sales success in their respective territories, and in turn, formed the basis for their incentive compensation.[19]

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[12] SER 0071–0073 (Christopher Dep.); SER 0279–0280, 0286–0287 (Buchanan Dep.).

[13] SER 0279–0280, 0286–0287 (Buchanan Dep.).

[14] SER 0056 (Christopher Dep.); SER 0129–0143, 0175–0187 (Christopher Dep. Exs. 19–21, 23–26); SER 0296 (Buchanan Dep.); SER 0349–0377 (Buchanan Dep. Exs. 19–26).

[15] SER 0064 (Christopher Dep.); SER 0294–0296 (Buchanan Dep.).

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[16] SER 0621–0623 (Declaration of Robert Pellegrino ("Pellegrino Decl.")); SER 0035, 0087–0089 (Christopher Dep.); SER 0228–0229 (Buchanan Dep.).

[17] SER 0623 (Pellegrino Decl.); SER 0228–0229 (Buchanan Dep.).

[18] SER 0623 (Pellegrino Decl.).

[19] *See, e.g.*, SER 0351 (Buchanan Dep. Ex. 19) (Buchanan told GSK that his sales efforts "will impact the volume change . . . and pull up the quarter[ly]" sales numbers); SER 0354 (Buchanan Dep. Ex. 20) (Buchanan told GSK that "[s]ales data will continue to improve as a result of" his work to improve consistency on "sales calls"); SER 0368 (Buchanan Dep. Ex. 24) (as a result of his efforts to "tweak [his] sales presentations," Buchanan felt that "Advair [sales performance] will improve

3. After leaving their employment at GSK,[20] Petitioners filed a putative class action in the United States District Court for the District of Arizona claiming that GSK had improperly classified them (and others similarly situated to them) as exempt from the FLSA's *overtime* compensation provisions. Specifically, Petitioners argued that because federal law prohibited them from selling directly to the end-user of the Company's products—patients—and because the physicians on whom they called do not pay for or inventory GSK's products,[21] PSRs like them do not "sell" as that term might be defined in the dictionary or understood in common parlance. Pet.App.41a–42a. Petitioners insisted that the only "sales" that occur in GSK's entire business model occur between GSK and wholesalers who in turn sell to pharmacies. *Id.*

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significantly"); SER 0121 (Christopher Dep. Ex. 10) (Christopher's sales efforts will "make a positive impact on our goal [and] our market share"); SER 0123–0127 (Christopher Dep. Ex. 12) (Christopher listing his "sales goal achievement" and expressing pride in his ability to exceed his sales goals).

[20] Petitioner Christopher's employment with GSK was terminated in May 2007 and petitioner Buchanan left GSK for a position as a PSR at another pharmaceutical company. Pet.App.2a.

[21] Petitioner's assertion that all PSRs throughout the industry are identically situated with respect to their job duties is factually inaccurate and unsupported by the record. For example, some customers of pharmaceutical companies do, in fact, in relatively unusual circumstances pay for and inventory drugs, and the discussion in the text would not apply to them. Nonetheless, the reasoning of DOL in its *amicus* briefs would reach the vast majority of PSRs.

The district court rejected that argument.[22] Looking to the definition of "sale" in Section 3(k) of the Act (and not, as Petitioners had urged, a dictionary definition) for purposes of determining what the term means in the context of the outside sales exemption, the court explained that the FLSA and DOL define the term "somewhat loosely." Pet.App.43a. Under the Act, a sale is "any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." Pet.App.43a–44a (internal quotation marks omitted); *see* 29 U.S.C. § 203(k). The District Court noted that in its most recent formal rulemaking, DOL explained that the exemption requires a sale only "in some sense." Pet.App.43a–44a; *see* 69 Fed. Reg. at 22162. Both the statute and final rule, the district court explained, provide for an interpretation of the term "sale" "beyond a constricted, traditional sense of the word." Pet.App.44a.

The district court concluded that Petitioners' physician-focused sales activity qualified as "sales" under Section 3(k) and therefore, consistent with DOL's final rule, Petitioners "plainly and unmistakably fit within the terms and spirit of the exemption" and are "exempt employees under the outside sales exemption." *Id.* at 46a. On this basis, the district court granted GSK's motion for summary judgment.

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[22] GSK argued in the alternative that Petitioners also were exempt under the "administrative employee" exemption, but the district court found it unnecessary to reach that question and it is not implicated by the Petition here.

4. Following entry of summary judgment, Petitioners moved the district court to alter or amend judgment on the ground that the district court had failed to consider DOL's *amicus* brief from the *Novartis* case. Pet.App.49a. Petitioners argued that the brief was entitled to "controlling deference" under *Auer*. The district court denied the motion, rejecting DOL's position as an "absurdity" and concluding that "[n]ot only is the DOL's current interpretation inconsistent with the statutory language and its prior pronouncements, but it also defies common sense" in light of the fact that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet.App.51a–52a.

5. The Court of Appeals affirmed. On appeal, DOL filed an *amicus* brief that largely recapitulated the brief in *Novartis*. The Court of Appeals began its analysis by addressing what, if any, deference it owed the positions set forth in that brief, and it concluded that, as in *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), *Auer* deference was not appropriate when an agency "has elected merely to paraphrase the statutory language." And that, the panel concluded, is exactly what DOL has done here.

DOL's regulations define a salesman somewhat circularly as someone who "mak[es] sales within the meaning of section 3(k) of the Act," 29 C.F.R. § 541.500(a)(1). The regulations in turn provide an "open-ended" definition of "sales within the meaning of section 3(k)." The definition begins by stating that such sales "*include* the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property," 29 C.F.R. § 541.501(b) (emphasis added). And in the next sentence, the Court of Appeals observed, the regulations complete the definition by simply "cross-referenc[ing] back to the language of Section 3(k) of the Act—the very language purportedly being defined." Pet.App.21a–22a.

Because DOL's *amicus* brief purported to interpret a regulation that merely "parroted" the language of the statute—*i.e.*, "'*does little more than restate the terms of the statute itself*,'" (quoting *Gonzales*, 546 U.S. at 256–57)—DOL's new, sharply constrained interpretation of the term "sales" in the *amicus* brief amounted to a "*reinterpretation* of Section 3(k)" that was not entitled to controlling deference. Pet.App.23a. Granting deference to DOL's brief in such circumstances, the court concluded, would in essence "sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking." Pet.App.24a.

The Court of Appeals further held that DOL's new interpretation of the term "sales" under Section 3(k) was not persuasive under *Skidmore*[23] in view of the "many similarities between PSRs and sales people in other fields, pharmaceutical industry norms, and the acquiescence of the Secretary over the last seventy-plus years" in the sales practices of the pharmaceutical industry. Pet.App.34a.

Having declined to defer to what it termed DOL's "about-face regulation, expressed only in ad hoc *amicus* filings," Pet.App.35a, the Court of Appeals looked to the statute and regulations and concluded that PSRs do in fact make "sales" and that the "sale" in the pharmaceutical industry is the "exchange of nonbinding commitments between the PSR and physician at the end of a successful call." Pet.App.26a. This "common sense understanding," which reflects the practical reality of the pharmaceutical industry, finds support in the text of Section 3(k), which makes "open-ended use of the word 'sale', which *includes* 'other dispositions,'" and by DOL's own usage and regulations, which as recently as 2004 reaffirmed the "openended concept that a salesman is someone who 'in some sense' sells." Pet.App.28a.

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[23] *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

The Court of Appeals denied rehearing en banc, Pet.App.53a, and this Petition followed.

REASONS FOR GRANTING THE PETITION

Petitioners correctly identify a split of authority on both the specific question of whether PSRs qualify for the FLSA's outside sales exemption and the broader question concerning the appropriateness of *Auer* deference in this specific context and more generally. Those underlying issues are important, and the division of authority leaves GSK—and, indeed, all pharmaceutical companies that employ sales representatives in the United States—in an untenable situation. GSK and those other companies cannot feasibly treat their sales representatives differently with respect to compensation and FLSA-eligibility on a circuit-by-circuit basis. But, absent intervention by this Court, GSK faces liability—and even the possibility of nationwide liability—in the Second Circuit for structuring its sales force in a manner the Ninth

Circuit has expressly approved. That situation is untenable. A national rule is essential, and only this Court can provide it.

Needless to say, GSK and petitioners disagree sharply on the correctness of the decision below and the appropriateness of *Auer* deference both in this context and more broadly. But all of that can be fully explored in the merits briefing. For now, what the parties agree on is more important than what divides them: this Court should grant certiorari to resolve the split of authority on these important issues.

I. The Decision Below Creates A Split Among The Circuit Courts of Appeals.

The decision below opens up an acknowledged and unambiguous split of authority over whether (i) PSRs "sell" within the meaning of that section and therefore meet the requirements of the FLSA's outside sales exemption and (ii) the amount of deference, if any, owed to DOL's reversal-by-*amicus* brief view of Section 3(k).

A. The Decision Below Creates A Split Among The Circuits Over Whether Pharmaceutical Sales Representatives Meet the Requirements Of The Outside Sales Exemption.

The Ninth Circuit and Second Circuit have now adopted starkly different approaches to the question of whether PSRs qualify for the FLSA's outside sales exemption. The Second Circuit holds that, because of the structure of sales in the regulated pharmaceutical industry, PSRs do not make "sales" within the meaning of Section 3(k). The Ninth Circuit disagrees and treats PSRs consistent with the practical industry understanding of their role—namely, as outside salespeople. In both cases, DOL filed an *amicus* brief articulating its novel position that the vast majority of the outside sales force in the pharmaceutical industry does not qualify for the FLSA's outside sales exemption. The Second Circuit deferred to DOL's newly-minted position, giving the brief *Auer* deference. The Ninth Circuit refused to apply *Auer* and found DOL's new position unpersuasive under *Skidmore*. The Ninth Circuit had the benefit of the Second Circuit's reasoning and expressly rejected it. Pet.App.17a. The conflict could not be starker.

Under DOL's current, restrictive definition, which it has advanced only in *amicus* briefs, a PSR must actually and personally transfer title to qualify for the outside sales exemption:

> "[S]ale" for the purposes of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.

Pet.App.79a (Dep't of Labor Ninth Circuit *Amicus* Br.).[24] In *Novartis*, the Second Circuit found that new position entitled to "controlling deference" under *Auer* "unless th[e] interpretations are plainly erroneous or inconsistent with the regulation." *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010) (internal quotation marks omitted). Having concluded that DOL's interpretation of "sale" did not fail that deferential and forgiving standard, the Second Circuit interpreted "sale" narrowly to reflect DOL's insistence on an actual, personal transfer of title and held Novartis' PSRs non-exempt. There was nothing idiosyncratic about Novartis' PSRs that produced this result. The obstacles that precluded Novartis' PSRs from consummating the sale to the Second Circuit's satisfaction are inherent aspects of the pharmaceutical industry and preclude the consummation of sales by the vast majority of all PSRs.

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[24] *See also* Pet.App.77a ("Because the Reps do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physician a non-binding commitment to prescribe GSK drugs to their patients when appropriate, they do not meet the regulations' requirement that their primary duty must be 'making sales' . . . . [T]he actual sale of GSK drugs

In reaching this decision, the Second Circuit found DOL's position "on this appeal" to be dispositive. *In re Novartis*, 611 F.3d at 153. The court was unconcerned by DOL's abandonment of the decades-old flexible, functional understanding of "sale" reflected in earlier DOL regulations or by DOL's lack of acknowledgement of its earlier interpretation.

The conclusion and reasoning of the court below were to the contrary. The Ninth Circuit construed the term "sales" to give effect to the "open-ended" use of the word "sale" in Section 3(k), which includes "other dispositions," and DOL's own regulations,

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occurs between the company and distributors (and then to the pharmacy." (citations omitted)).

which for over seventy years have "emphasized a sensible application of the exemptions." Pet.App.28a. The Ninth Circuit declined to give automatic deference to DOL's *amicus* brief and indeed found it unpersuasive under *Skidmore*.

The Ninth Circuit, unlike the Second Circuit, considered not just DOL's position in this case but also DOL's actual regulations and guidance establishing a practical and flexible approach to "sales," *supra* at 4–6, and the long-standing actual practice in the pharmaceutical industry of classifying PSRs as exempt outside salespeople. The Ninth Circuit recognized, as Judge Posner explained for the Seventh Circuit, that while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible hypothesis is that the . . . industry has been left alone" because DOL considered the practices lawful. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007).

These Courts of Appeals further diverge with respect to DOL's *amicus* position (which Petitioners' embrace in the Petition) that PSRs are just "promoters who merely pave the way for others' sales" and who are therefore specifically excluded by the "make sales" requirement of the outside sales exemption. Pet.18–19. The Second Circuit found that view persuasive, while the Ninth Circuit recognizes that the analogy does not work given the "structure and realities of the heavily regulated pharmaceutical industry." Pet.App.25a. PSRs do not "pave the way" for some other sales force; PSRs *are* the outside sales force for this industry. As the

Ninth Circuit aptly explains, the distinction between "selling and promoting is only meaningful if the employee does not engage in *any* activities that constitute 'selling' under the Act." *Id.* at 31a. To the extent that GSK's sales representatives "promote," they do so "toward the end goal of causing a particular doctor to commit to prescribing *more* of the particular drugs in the PSR's drug bag." *Id.* The latter is the "sale" in this industry, and the PSRs do not merely "pave the way" for that "sale." They make it.

In sum, as the Petition recognizes, there is a stark, acknowledged and irreconcilable split between the Second and Ninth Circuits. The Second Circuit views unique aspects of the pharmaceutical industry—having nothing whatsoever to do with the purposes underlying the outside sales exemption—as creating a technical lack of sales. Indeed, in the Second Circuit's view, an entire industry—one of the Nation's most important with billions in annual sales—has no outside sales force simply because PSRs direct their efforts to the physicians who write prescriptions and not the wholesalers, pharmacies, or consumers who are permitted by law to purchase prescription drugs. *See In re Novartis*, 611 F.3d at 147, 154–55. The Ninth Circuit, by contrast, views those inherent aspects of the industry as posing no difficulty because of the flexibility built into the statutory definition and DOL's traditional regulatory approach to sales. The Ninth Circuit recognizes that PSRs make the relevant sales in this industry and certainly make sales "in some sense."

B. The Decision Below Creates A Split Among the Circuits Over Whether and How to Apply *Auer* Deference.

The split between the Second and Ninth Circuits runs deeper than the specific question of whether PSRs qualify for the FLSA's outside sales exemption. There is also a conflict on more fundamental questions concerning the deference owed to efforts to change longstanding administrative positions through nothing more formal than the filing of an *amicus* brief. In its decision below, the Ninth Circuit acknowledged that its split with the Second Circuit was based upon its reaching a "different conclusion" from the *Novartis* Court on the question of what deference is owed to the position articulated by DOL in its *amicus* briefs. Pet.App.17a. That difference is stark indeed: The Second Circuit concluded that DOL's position is owed "controlling deference" under *Auer*, *In re Novartis*, 611 F.3d at 149 (internal quotation marks omitted), and the Ninth Circuit concluded that the agency's position was unpersuasive and thus owed "*no* deference" even under *Skidmore*, Pet.App.17a (emphasis added).

1. As Petitioners themselves make plain, Pet.14–16, the decision below opens a clear split of authority over the reach of *Auer*, including applicability of this Court's decision in *Gonzales*, 546 U.S. 243. In *Gonzales*, this Court considered whether "controlling" deference under *Auer* was owed to an interpretive rule that the Attorney General argued was an elaboration of his own regulation. This Court, however, concluded that the interpretative rule at issue was not entitled to deference under *Auer* because the regulation it purportedly

elaborated upon "just repeat[ed] two statutory phrases and attempt[ed] to summarize others" giving "little or no instruction on" the issue that interpretative rule was attempting to address. *Id.* at 257. An agency interpretation of its own regulation that "does little more than restate the terms of the statute itself," this Court concluded, is not entitled to deference under *Auer* because the agency "does not acquire special authority to interpret its own words when, instead, of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.*

In its decision below, the Ninth Circuit concluded that the level of deference owed to DOL "is best captured" by *Gonzales* because the same sort of "parroting" language at issue in *Gonzales* "is present in the Secretary's outside sales regulations," which do little more than "direct employers, employees, and this court back to the language of the FLSA" for its definition of sales. Pet.App.21a–23a. DOL's *amicus* brief, therefore, presents only a "*reinterpretation* of Section 3(k)" itself and there is no "meaningful regulatory language to interpret." *Id.* at 23a–24a.

The Second Circuit, on the other hand, expressly rejected the applicability of *Gonzales*, concluding that DOL's regulations do not merely parrot the statutory language but instead "define and delimit the terms used in the statute"—including the term "sales"—and therefore DOL's interpretation-by-*amicus* brief was entitled to "controlling deference" under *Auer*. *See In re Novartis*, 611 F.3d at 149.

2. Also fundamental to the split (but overlooked by Petitioners) is the applicability of *Auer* when an

agency interpretation effects an abrupt and unexpected change outside the more formal rulemaking process employed to reach earlier agency positions. The need for a resolution of this question is particularly acute because DOL's effort here to regulate by *amicus* brief is not an isolated incident. The Agency has indicated that it intends to make greater use of *amicus* briefs, and if the Agency's *amicus* briefs are really entitled to "controlling deference" even when they depart from longstanding positions adopted through more formal means, then the Agency would be irrational not to do so.[25]

Fortunately, however, the law does not make it that easy for an agency to change its regulatory views via *amicus* brief (or serial *amicus* briefs). To be sure, *Auer* indicates that an agency's interpretation of its own ambiguous regulations can be *entitled to "controlling" deference unless that* interpretation is "plainly erroneous or inconsistent with the regulation." 519 U.S. at 462 (internal quotation marks omitted). This is so even if, as in *Auer* itself, the interpretation is announced in a legal brief. *See, e.g., Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880–81 (2011). But *Auer* also indicates *that there are limits to that deference, and that* there must be "no reason to suspect that the interpretation d[id] not reflect the agency's *fair and*

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[25] The Solicitor of Labor is reported to have told an audience last year that she intends to "reinvigorate" DOL's *amicus* program. *See* Richard Renner, *Solicitor of Labor Patricia Smith speaks about policy*, Whistleblowers Protection Blog (June 25, 2010), http://www.whistleblowersblog.org/2010/06/.

considered judgment on the matter in question." *Auer*, 519 U.S. at 462 (emphasis added). And more recently, this Court has explained that where an agency's change in an interpretation of its own regulation creates "unfair surprise," the change can present a ground for disregarding the agency's new interpretation advanced in litigation. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007); *cf. Kennedy v. Plan Adm'r for DuPont Savings and Inv. Plan*, 129 S. Ct. 865, 872 n.7 (2009) (noting that change in the Labor Secretary's position on the applicability of an anti-alienation provision to conform to the Treasury Secretary's different position on the same interpretive issue did not vitiate deference to the position advanced by both agencies in an *amicus* brief). Lower courts are now grappling with how to assess whether an agency's proffered interpretation is the result of a "fair and considered judgment" and with when an agency's change in position about the meaning of its regulations constitutes "unfair surprise" sufficient to vitiate or lessen the deference owed under *Auer*.

The Second Circuit all but ignored the broader regulatory framework and the inconsistent positions adopted by DOL in the past, which were neither acknowledged nor explained. The Second Circuit focused exclusively on DOL's position "on this appeal." The Ninth Circuit, by contrast, emphasized the agency's seventy-plus year history of interpreting the term "sales" (and therefore the outside sales exemption itself) in a flexible manner. Indeed, the court below explained that "the Secretary's acquiescence in the sales practice of the drug industry for over seventy years further butresse[d]" the court's decision and noted that until DOL filed its *amicus* brief in *Novartis*, DOL itself had never challenged the "conventional wisdom that detailing [*i.e.*, the activity of PSRs] is the functional equivalent of selling pharmaceutical products." Pet.App.34a.

The Ninth Circuit's focus upon DOL's inconsistency was in keeping with its own precedents as well as those of other courts of appeals. In *Boose v. Tri-County Metropolitan Transportation District of Oregon*, 587 F.3d 997 (9th Cir. 2009), the Ninth Circuit concluded that the fact that the Department of Transportation had changed its view was not a separate ground for disregarding the agency's new position, but *only* because the agency had already taken "recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation" and there was therefore "'no unfair surprise.'" *Id.* at 1005 n.13 (quoting *Long Island Care at Home*, 551 U.S. at 170–71).

Other courts have held expressly that a "fair and considered" agency position is one that is consistent with prior interpretations. *See, e.g.*, *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 n.15 (D.C. Cir. 2002) (noting that whether an interpretation is "fair and considered" turns on whether the agency has "ever adopted a different interpretation of the regulation or contradicted its position on appeal" and concluding that deference to an agency's position contained in a brief on appeal therefore was inappropriate where the agency had already adopted a contradictory interpretation during an earlier review (internal quotation marks omitted)). And other courts, even if they do not require such consistency, at least consider the consistency of an agency's current position with prior interpretations before deferring to it. *See, e.g., Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777–78 (5th Cir. 2010) (finding "little reason to believe" that the position was not the fair and considered judgment of the agency "[w]ithout stronger evidence that the agency has applied the regulation at issue inconsistently"); *Massachusetts v. United States*, 522 F.3d 115, 129 (1st Cir. 2008) (rejecting an argument that the agency had adopted a definition of the term "party" for the first time in litigation and deferring under *Auer* where the agency's proffered reading of the term was "consistent with the agency's practice generally, as well as its litigation position in this court").

The focus upon the consistency of agency interpretations by the courts of appeals is consistent with decisions of this Court as well. Even before *Long Island Care at Home*, this Court had long recognized that inconsistency in agency positions can lessen the deference owed to an agency's interpretation. *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (stating that an agency's interpretation of its regulations does not necessarily control where there are "other indications of the Secretary's intent at the time of the regulation's promulgation" and that an agency position that conflicts with an earlier position "is entitled to considerably less deference" (internal quotation marks omitted)); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (noting that "[a]n additional reason for rejecting the INS's request for heightened deference to its position is the inconsistency of the positions the BIA has taken through the years"); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (concluding that the Department of the Interior's "current interpretation, being in conflict with its initial position, is entitled to considerably less deference"). And just last Term, when this Court deferred to agency interpretations advanced in *amicus* briefs, the Court explained that the interpretations were not inconsistent with past agency views.

In *Chase Bank USA*, this Court afforded deference under *Auer* to an interpretation of a regulation advanced in an *amicus* brief by the Board of Governors of the Federal Reserve. In addressing whether the interpretation was the result of the Board's "fair and considered judgment," this Court noted that the Board's interpretation was "entirely consistent with its past views" and concluded that

> there is no reason to suspect that the position the Board takes in its *amicus* brief reflects anything other than the agency's fair and considered judgment as to *what the regulation required at the time the dispute arose.*

Chase Bank USA, 131 S. Ct. at 881 (emphasis added). And in *Talk America v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254 (2011), this Court concluded that there was no reason to suspect that the Federal Communications Commission's "novel interpretation" advanced for the first time in an *amicus* brief was anything other than reflective of the Commission's "fair and considered judgment." *Id.* at 2263. The Court noted that the Commission had argued that "the issue in these cases did not arise until recently" and that the Commission's interpretation in its brief was consistent with the "regulatory history" and did not conflict with its earlier orders. *Id.* at 2263–65.

The Second Circuit's uncritical and exclusive focus in *Novartis* upon the "position taken by the Secretary *on this appeal*," *see In re Novartis*, 611 F.3d at 153 (emphasis added), cannot be reconciled with this Circuit and Supreme Court precedent. The Second Circuit did not ask whether DOL's interpretation in its *amicus* brief was consistent with that agency's past views or the regulatory history concerning "sales" and the court therefore did not assess whether the interpretation advanced for the first time in the *amicus* brief reflected DOL's fair and considered judgment as to what the regulations required at the time the disputes arose (or, indeed, at any time during the previous seventy years). This case will provide the Court an opportunity to explore the limits of *Auer* deference and whether an abrupt change of position advanced in an *amicus* brief is entitled to the same deference as an agency position on a novel question raised for the first time by the litigation in which the brief is filed.

3. Finally, this case will provide the Court with an opportunity to address whether agencies will be allowed to use *Auer* to circumvent the rulemaking process.

The Ninth Circuit explained that it could not afford DOL's new interpretation "controlling deference" under *Auer* because to do so would "in essence" "sanction bypassing of the Administrative Procedures Act and notice and comment rulemaking." Pet.App.24a (citing *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000)). That caution is consistent with—indeed, required by—this Court's precedents. For example, in *Long Island Care at Home*, this Court held that deference to DOL's views concerning a different exemption to the FLSA minimum wage requirements (one applicable to "domestic service" employees) was not vitiated by the agency's change in position over time where the agency had taken "recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation" thereby making the prospect of "unfair surprise" unlikely. 551 U.S. at 170–71. And in *Christensen*, this Court cautioned against deferring under *Auer* to an interpretation in an interpretative letter of an unambiguous regulation because that would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." 529 U.S. at 588.

Indeed, as Justice Scalia cautioned last Term in his concurring opinion in *Talk America*, "[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well" and "deferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases" and thereby "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government." *Talk Am.*, 131 S. Ct. at 2266.

The Second Circuit, however, exercised none of this caution or skepticism in evaluating an *amicus* brief that deviated from past agency views undertaken through substantially more formal processes. That court's extreme deference to DOL's *amicus* positions ignored this Court's clear precedents and put it out of step with the approach of other Circuits. Worse still, the Second Circuit has allowed DOL to circumvent the rulemaking process, and thus to regulate by *amicus* brief. The Court's review in this case would not only allow it to bring the Second Circuit into line, but it would also provide an opportunity for this Court to give substantial guidance to the lower courts concerning the appropriate bounds of *Auer* deference.

* * *

For all the foregoing reasons, therefore, Respondent agrees with Petitioners that there is an intractable split of authority. Indeed, that split is even deeper than Petitioners suggest and would allow this Court to provide substantial direction on recurring and important questions concerning the proper scope of *Auer* deference.

II. A National Rule Establishing The Proper Application of the Outside Sales Exemption Is Critically Important.

Because the decision below was correctly decided, GSK and other pharmaceutical companies can continue for now to adhere to the longstanding and universal practice of classifying PSRs as exempt in the nine western states covered by the Ninth Circuit. But they do not have that luxury in New York, Connecticut, or Vermont, where the Second Circuit's decision in *Novartis* now controls. In those States, pharmaceutical companies can no longer prevail on an argument that their PSRs are subject to the outside sales exemption, at least insofar as claims brought directly under the FLSA are concerned. Indeed, to the extent that, as in *Novartis*, particular plaintiffs pursue collective actions under the FLSA in those states challenging the classification of PSRs on behalf of a putative nationwide class, even an employee working within the Ninth Circuit might be allowed to opt-in to such a suit under the special collective action procedures that govern FLSA actions.[26]

The prospect that a court within the Second Circuit in such an action could potentially award damages in favor an employee within the Ninth Circuit because the employer had structured and paid its sales force in a manner expressly approved by the Ninth Circuit is a wholly untenable situation. The need for a uniform, national rule is critical, and only this Court can provide it.

Nor is the confusion and uncertainty confined to the Second and Ninth Circuits. Other courts have noted the split of authority and some have sided with the Second Circuit. *See, e.g.*, *Palacios v.*

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[26] For example, earlier this month, a sales person for Allergan, Inc., which is headquartered in California, filed a putative FLSA collective action against the company in western New York state, alleging that Allergan "has engaged in a uniform practice of violating FLSA, as detailed in this Complaint by failing to provide overtime compensation to Sales Specialists for work performed in excess of a forty hour work week" and seeking issuance of a court-supervised notice pursuant to Section 16(b) of the FLSA, 28 U.S.C. § 216(b), to members of a putative class that is potentially nationwide in scope. (Compl., *Brace v. Allergan, Inc.*, No. 11-cv-847, ¶¶ 15-16, 43 (W.D.N.Y. Oct. 7, 2011).)

Boehringer Ingelheim Pharm., Inc., -- F. Supp. 2d --, 2011 WL 2837464 (S.D. Fla. July 12, 2011) (acknowledging the split in circuit authority and following the Second Circuit in holding that sales representatives do not meet the requirements of the outside sales exemption).

The concern that litigation will flourish is not worried conjecture on the part of the industry. More than a dozen other individual and class actions challenging the industry's classification of sales representatives as exempt employees are pending in federal courts around the country. Pet.4. The split in authority over the proper application of the outside sales exemption threatens utter unpredictability in structuring the sales force and managing sales costs in an important industry. *Cf. Schaefer-LaRose v. Eli Lilly & Co.*, No. 07-cv-1133-SEB-TAB, 2010 WL 3892464, at *1–2 (S.D. Ind. Sept. 29, 2010) (noting *Novartis* decision and the then-pending appeal in this case before the Ninth Circuit but declining to reconsider a decision holding PSRs exempt: "Our decision cannot be a swinging pendulum, vacillating back and forth as each new ruling addressing this question is handed down by some court or another across the nation.").[27]

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[27] An appeal from the district court's decision holding PSRs exempt in *Schaefer-LaRose* is pending before the Seventh Circuit, *see Schaefer-LaRose v. Eli Lilly & Co.*, No. 10-3855 (7th Cir.), and an appeal from the decision of another district court holding PSRs are not exempt is pending in the Fifth Circuit, *see Harris v. Auxilium Pharm.*, Inc., No. 11-20151 (5th Cir.). Given the unambiguous split between the Second Circuit and Ninth Circuit and the abundance of district court decisions

The split also threatens unpredictability in litigation costs and liability under the FLSA if lower courts follow the Second Circuit's lead. There are upwards of 90,000 people employed as PSRs in the United States. Pet.App.28a. The damages exposure in the *Novartis* case alone (involving only 2,500 of those sales representatives) could reach $100 million. *See* Mark Hamblett, *Circuit Finds Novartis Drug Reps Not Exempt From Overtime Law*, N.Y.L.J. (July 7, 2010), *available at* http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202463306500&slreturn=1. Moreover, the financial impact to the industry from that approach could be magnified if, as is permitted in some states, state wage and hour laws are interpreted to track the FLSA and the Second Circuit's approach is followed (although it should not be). *See, e.g.*, *Pa. Dep't of Labor & Indus., Bureau of Labor Law Compliance v. Stuber*, 822 A.2d 870, 873 (Pa. Commw. Ct. 2003) (noting that when interpreting state laws courts may look to federal case law interpreting parallel federal statutes, including the FLSA).

There is certainly nothing in the FLSA or the industry practice that suggests that this split in authority is tolerable. The FLSA was designed as a way to bring nationwide uniformity to working conditions and address the plight of the workers

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addressing the issue, there is no reason for this Court to await the decisions of still more courts of appeals before establishing a national rule and eliminating the uncertainty now hanging over the pharmaceutical industry.

forced to endure long work weeks due to uneven bargaining power. The latter concerns have no application to the highly mobile and well-compensated PSRs, who if they work long hours do so to increase their already substantial compensation through incentive compensation. Nonetheless, the concern for uniformity applies with full force. The pharmaceutical industry is a national industry where consistent practices are at a premium. If the industry really must restructure the PSR position to comply with the Second Circuit decision, it would make sense to do so on a nationwide basis. Continuing the traditional practice only in the Ninth Circuit is not a practical alternative.

And it is not just the pharmaceutical industry that is threatened with unpredictability; the split in authority over the definition of "sale" triggered by DOL's newly restrictive interpretation of the term also has implications for FLSA enforcement more generally. The definition of "sale" in Section 3(k) applies "in this chapter" and the term (or a variant of it) appears more than a dozen times in the Act. The split therefore affects other FLSA provisions, and the employers covered by them. For example, Section 7 establishes maximum hour requirements for some employers in part by looking to the volume of "sales," 29 U.S.C. § 207(b)(3), and Section 15 makes it unlawful to "sell" goods "in the production of which any employee was employed in violation of" the Act's minimum wage or overtime provisions, 29 U.S.C. § 215(a)(1). DOL's new, constricted definition of "sales" therefore risks altering the scope of the protections of the FLSA in ways that extend beyond the outside sales exemption upon which DOL has focused in its *amicus* briefs.

Finally, restructuring the PSR position to comply with the Second Circuit decision would work a fundamental change in the structure of the sales force in the pharmaceutical industry. It is almost certain that a shift by GSK and other pharmaceutical companies in their classification of PSRs from exempt to non-exempt employees would require a change in the very nature of the position. For example, if non-exempt, PSRs would likely be subject to more regimented and structured work activities, require closer supervision and monitoring, and otherwise lose the flexibility they currently enjoy, such as the ability to complete key job requirements at the times most convenient for the employee. *Cf. Jewel Tea Co. v. Williams,* 118 F.2d 202, 207–08 (10th Cir. 1941) (discussing the reasons for exempting outside salesmen from overtime requirements). PSRs also could lose the benefit of an incentive-based compensation model that traditionally has rewarded the individual efforts of motivated and skilled PSRs but would be ill-suited for a non-exempt sales force.

The problem for the pharmaceutical industry would be particularly acute because of the transferability of the basic sales training and skills that PSRs use every day to sales jobs in other industries. Just as PSRs are often recruited from sales jobs in other industries, PSRs who value the professional benefits of working in an exempt position could just as surely leave the industry and apply their sales skills in other industries in which the regulatory model does not create limits on the extent to which sales representatives can fully consummate the final transfer of title. Indeed, precisely because DOL's new position has nothing to do with the basic nature of the sales function that PSRs undoubtedly perform and everything to do with regulatory details of the pharmaceutical industry having nothing to do with the policies underlying the outside sales exemption, the pharmaceutical industry faces a unique threat of the PSRs migrating to similar sales jobs in other industries.

The Court should grant the petition to review these important questions on which the Circuits are now clearly divided.

CONCLUSION

The respondent does not oppose the petition for a writ of certiorari.

Respectfully submitted,

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October 17, 2011

AMICUS
CURIAE
BRIEF

2

No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A. GLAXOSMITHKLINE,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

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Money Magazine (2007) *available at* http://tinyurl.com/2nw4w9 10

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members, including numerous members in the pharmaceutical industry, are subject to the Fair Labor Standards Act ("FLSA" or "Act"), and are deeply affected by the square split between the Second and Ninth Circuits over the scope of the FLSA's outside sales exemption. Moreover, the Chamber's members must comply with a host of other statutory requirements that are subject to interpretation by federal agencies. These laws best serve the interests of employees and employers alike when their application is uniform, stable, and clear. This case provides the Court with an opportunity to clarify both the scope of the FLSA's outside sales exemption and, more broadly, the circumstances in which an agency may fundamentally reinterpret a statute without notice and comment. The Chamber therefore has a strong interest in review by this Court.

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[1] No counsel for a party wrote this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both petitioner and respondents received timely notice of *amicus*'s intent to file the brief, and consented to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case, which involves the overtime-exempt status of pharmaceutical sales representatives, presents a timely opportunity for the Court to resolve a square circuit split on two questions of national importance. By way of background, the FLSA exempts workers who are employed "in the capacity of outside salesman" from the overtime pay requirements of the Act. 29 U.S.C § 213(a)(1). The statute in turn defines the terms "sale" and "sell" to include:

> [A]ny sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 203(k) ("Section 3(k)").

The DOL has issued regulations that offer a non-exclusive definition of what is included in the term "sales," but then refer back to the statutory defintion. They thus elaborate upon, but fail to limit, the scope of the outside sales exemption under the FLSA. Specifically, the regulations provide that an "outside salesman" is an employee who customarily and regularly works away from his or her employer's place of business and:

> Whose primary duty is:

> (i) making sales within the meaning of [29 U.S.C. § 203(k)]

29 C.F.R. § 541.501(a). The regulations then note that:

> Sales within the meaning of section 3(k) of the Act *include* the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition.*

Id. § 541.500(b) (emphases added).

As explained by the parties, the Ninth Circuit and the Second Circuit disagree whether pharmaceutical sales representatives qualify for the foregoing outside salesperson exemption, and, in particular, whether they are engaged in "making sales." And in answering these questions, the circuits have also split over the scope of *Auer* deference.

On the one hand, the Second Circuit has given "'controlling' deference" to a Department of Labor ("DOL") *amicus* brief that interpreted the agency's regulations related to the outside salesperson exemption. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 149 (2d Cir. 2010) ("*In re Novartis*") (quoting *Auer v. Robbins*, 519 U.S. 452, 461 (1997)). Specifically, in the *amicus* brief that the DOL submitted in the *Novartis* case, the agency—for the first time—took the position that pharmaceutical sales representatives do not make "sales," and are thus ineligible for the outside sales exemption, because they cannot "lawfully transfer ownership" of a drug, "take an order for its purchase" or "obtain from the physician a binding commitment to prescribe." *Id.* at 154. Applying solely the definition urged by the DOL's brief, the Second Circuit found that pharmaceutical sales representatives do not qualify for the FLSA's outside salesperson exemption. *Id.* 153.

On the other hand, the Ninth Circuit, in the decision below, found that pharmaceutical sales representative are engaged in "making sales" and that they do qualify for exempt status. Further, it held that the DOL's *amicus*-brief interpretation of the outside salesperson exemption regulation was not entitled to *Auer* deference because the regulation's explanation of the term sales essentially "parrot[s]" statutory language. *Christopher v. Smithkline Beecham Corp.*, 635 F.3d 383, 394 (9th Cir. 2011) (quoting *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006)). That is, the regulation ultimately "cross-references back to the language of Section 3(k) of the Act—the very language purportedly being defined." *Id.* Accordingly, the regulation "clarifies nothing" and is "not an example of the DOL employing its expertise to elucidate meaning to which [courts] owe *Auer* deference." *Id.* (internal quotation marks omitted). Interpreting the statute directly, the Ninth Circuit examined the structure of the pharmaceutical industry and the purpose of the outside sales exemption. *Id.* at 395-98. It then concluded that the exemption applied to pharmaceutical sales representatives because "[e]ven though [they] lack some hallmarks of the classic salesman, the great bulk of their activities are the same, as is the overarching purpose of obtaining a commitment to purchase (prescribe) something." *Id.* at 398.

The Chamber believes the Ninth Circuit decision below is correct, both in terms of its substantive outcome and the level of deference that it afforded the DOL's *amicus* brief in this case. Nevertheless, the Chamber files this brief to emphasize that the foregoing split is of sufficient importance and urgency that prompt review by the Court is warranted in this case.

The questions presented are exceedingly important to a major national industry and, indeed, to the entire business community. Pharmaceutical sales representatives have been treated as overtime-exempt by their employers, the courts, and the DOL for decades. As such, the DOL's recent and sudden endorsement of Petitioners' claims has served to confound settled expectations of both employers and employees in the pharmaceutical industry and has helped unleash a flood of nationwide collective actions. Unless the Second Circuit's erroneous holding in *In re Novartis* is rejected, such suits could potentially lead to billions of dollars in unexpected liability. Further, they could force the industry to abandon pay practices that have existed—virtually unchallenged—since before the Second World War and that represent the most appropriate compensation method for pharmaceutical sales representatives given their job responsibilities. More broadly, review in this case also offers a valuable opportunity for the Court to clarify when and how an agency may seek to impose major, retroactive policy changes outside the notice and comment process.

Two additional factors make it particularly appropriate that the Court resolve the questions presented promptly, by granting review in this case.

First, because plaintiffs' attorneys will likely avoid filing future cases in the Ninth Circuit and instead file in the Second Circuit, allowing further percolation would provide little benefit and instead invite only forum shopping. This forum shopping would be especially prejudicial given that most pharmaceutical manufacturers operate nationwide, and could therefore be subjected to nationwide liability based solely on collective action suits in the Second Circuit. Second, because the DOL's position has triggered a flood of new cases challenging years of past conduct, immediate resolution is necessary to avoid the imposition of extensive retroactive liability. Each of these factors justify speedy resolution of the square split presented in this case.

Finally, granting review in this case would provide the Court with an opportunity to reject the oft-repeated, but entirely unjustified trope that exemptions to the FLSA must be narrowly construed against employers. As Justice Scalia has rightly suggested, this sort of "interpretive canon" lacks any principled justification. Yet a number of courts analyzing the outside salesperson exemption regularly rely on it. Although such reliance may not be an independent basis for certiorari, the opportunity to redress it provides an additional benefit to review in this case.

ARGUMENT

I. The Questions Presented Are Of National Importance.

The questions presented are of major significance to the pharmaceutical industry and, indeed, the entire national business community.

A. The Second Circuit's rule would expose pharmaceutical manufacturers to billions of dollars of unwarranted and retroactive liability.

Respondents have long compensated pharmaceutical sales representatives on an exempt (overtime ineligible) basis. As the Ninth Circuit noted, the pharmaceutical sales representatives in this case received a fixed salary that is generally supplemented by bonuses tied to sales made in an employee's assigned geographical region. 635 F.3d at 386-87. This exempt compensation model is well-established and was well-accepted by employers and employees alike throughout the industry. Indeed, over the course of 70 years following the passage of the FLSA, suits such as this one were virtually unknown. No court had ever held that pharmaceutical sales representatives were subject to the overtime requirements of the FLSA. And the DOL's guidance regarding the outside sales exemption suggested a functional, purposive approach wholly supportive of the proposition that pharmaceutical sales representatives are engaged in making sales for purposes of the outside salesperson exemption.[2]

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[2] *See* DOL, Wage and Hour and Public Contracts Divisions, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition at 45 (Oct. 10, 1940) ("Stein Report"), *available at* http://tinyurl.com/3qpcwx5 (stating that the DOL's outside sales exemption should cover those who "in a practical sense, . . . are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)"); 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (recognizing that the exemption applies when employees "'*in some sense* make a sale'") (quoting Stein Report at 46) (emphasis in original).

Beginning in late 2006 and early 2007, however, plaintiffs' attorneys began filing putative collective action suits alleging that the exempt compensation model used to compensate pharmaceutical sales representatives violated the overtime requirements of the FLSA and/or analogous state laws. *See, e.g.*, *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008); *Barnick v. Wyeth*, 522 F. Supp. 2d 1257 (C.D. Cal. 2007). Initially, the majority of district courts to review such claims rejected them.[3] However, in October 2009, the DOL filed its *amicus* brief in *In re Novartis*. In its brief, the DOL abandoned 70 years of practice, and departed from its longstanding endorsement of a flexible, purposive approach to the concept of "sales" in favor of a rigid and formalistic requirement that outside salespeople obtain binding commitments and make direct, "actual sales." Brief for the Secretary of Labor as *Amicus Curiae* at 10, *In re Novartis*, 611 F.3d 141.

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[3] *Delgado v. Ortho-McNeil, Inc.*, No. 07 Civ. 263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. 07 Civ. 00127, 2009 WL 3326632, at *6 (C.D. Cal. Feb. 6, 2009); *Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669, 685-86 (W.D. Pa. 2009) (treating analogous state law requirements as coterminous with FLSA and rejecting state law claims based on interpretation of FLSA); *Brody v. AstraZeneca Pharms.*, No. 06 Civ. 6862, 2008 WL 6953957, at *6-9 (C.D. Cal. June 11, 2008) (same); *Menes v. Roche Labs., Inc.*, No. 07 Civ. 01444, 2008 WL 6600518, at *2 (C.D. Cal. Jan. 7, 2008) (same); *Barnick*, 522 F. Supp. 2d at 1265 (same); *D'Este v. Bayer Corp.*, No. 07 Civ. 3206, 2007 WL 6913682, at *4 (C.D. Cal. Oct. 9, 2007) (same). *But see Ruggeri v. Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 254, 272 (D. Conn. 2008); *Amendola*, 558 F. Supp. 2d at 472.

Not surprisingly, the DOL's new position has been followed by a flood of additional collective action suits claiming a right to overtime pay on behalf of pharmaceutical sales representatives throughout the nation.[4] These suits pose the risk of crushing liability. There are tens of thousands of well-paid pharmaceutical sales representatives throughout the industry. *IMS Health Inc. v. Mills*, 616 F.3d 7, 14 (1st Cir. 2010) (noting that the industry employs some "90,000 pharmaceutical sales representatives [who] make weekly or monthly one-on-one visits to prescribers nationwide"). Accordingly, the potential liability created by these suits reaches into the *billions* of dollars.

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[4] *See, e.g.*, *Fisher v. Shionogi Pharma, Inc.*, No. 11 Civ. 571 (E.D. Ark July 19, 2011); *Brown v. Novo Nordisk, Inc.*, No. 11 Civ. 1702 (E.D. Cal. June 22, 2011); *Gonzales v. Eisai, Inc.*, No. 11 Civ. 2250 (N.D. Cal May 6, 2011); *Rader v. Astrazeneca Pharm., LP Corporation et al.*, No. 11 Civ. 138 (S.D. Miss. March 7, 2011); *Malveaux v. Astrazeneca Pharm. LP*, No. 11 Civ. 286 (M.D. Fla. Feb. 10, 2011); *Forte v Sanofi-Aventis US, Inc.*, No. No. 11 Civ. 17 (W.D. Tex. Jan. 6, 2011) (case transferred to D. N.J., No. 11 Civ. 5374); *Kaiser v. Daiichi Sankyo, Inc.*, No. 10 Civ. 918 (S.D. Ohio Dec. 21 2010) (case transferred to D. N.J., No. 11 Civ. 2414); *Koslofsky v. Santarus, Inc.*, No. 10 Civ. 9160 (S.D.N.Y. Dec. 8 2010); *Bethume v. Bristol-Myers Squibb*, No. 10 Civ. 8700 (S.D.N.Y Nov. 18, 2010) (case transferred to D. N.J., No. 11 Civ. 3864); *Heldman v. King Pharm., Inc.*, No. 10 Civ. 1001 (M.D. Tenn. Oct. 22, 2010); *Jones v. Takeda Pharm. NA, Inc. et al.*, No. 10 Civ. 6240 (N.D. Ill. Sept. 29, 2010); *Batchkoff v. Boehringer Ingelheim Pharm., Inc.*, No. 10 Civ. 4830 (N.D. Cal. Sept. 24, 2010); *Martinez et al. v. Forest Labs Inc.*, No. 10 Civ. 6032 (S.D.N.Y. Aug. 11, 2010); *Quinn v. Endo Pharm.*, No. 10 Civ. 11230 (D. Mass. July 22, 2010); *Burdine v. Covidien Inc.*, No. 10 Civ. 194 (E.D. Tenn. July 20, 2010); *Raimundi* v. *Astellas US, LLC et al.*, No. 10 Civ. 5240 (S.D.N.Y. July 9, 2010); *Bentson v. Pfizer, Inc.*, No. 10 Civ. 7680 (N.D. Ill. Feb. 2, 2010); *Evavold v. Sanofi-Aventis US, Inc.*, No. 09 Civ. 5529 (D. N.J. Oct. 29, 2009).

Such liability, moreover, would be entirely inconsistent with the purposes of the FLSA and reflect nothing more than an unjustified windfall for the plaintiffs and their attorneys. Simply put, the FLSA was not designed to mandate overtime pay for highly professional and highly compensated employees such as pharmaceutical sales representatives. *Cf. Nicholson v. World Bus. Network, Inc.*, 105 F. 3d 1361, 1363 (11th Cir. 1997) ("The goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection. The chief financial officer of a company, for instance, would be less likely to be exploited than a janitor or assembly linesman."); *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510 (7th Cir. 2007) (noting the FLSA's purpose "to increase the welfare of low-paid workers"). As the court below observed, far from being exploited, the plaintiffs in this case "instead earn salaries well above minimum wage—up to $100,000 a year." 635 F.3d at 388 (internal quotation marks omitted).[5] Indeed, the pharmaceutical sales representetive position was recently chosen as one of the best American jobs. *See* Young and Restless—top 20 jobs, Money Magazine (2007) *available at* http://tinyurl.com/2nw4w9 (last visited October 15, 2011).

Moreover, the pharmaceutical sales representatives in this case not only exhibit all of the key traits of the traditional travelling salesperson, they receive a proxy for overtime pay in the form of sales-based bonuses. 635 F.3d at 388 (plaintiffs "receive bonuses *in lieu of overtime* as an incentive to increase their efforts.") (emphasis added). Thus, to the extent that they worked long hours, they did so not "out of desperation," *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987), but instead based on an incentive to increase their bonus. Of course, had these individuals been entitled to overtime payments in the past, it is highly likely that "either [their] base pay . . . , or the commission rate, or both, would [have] decline[d], to offset the overtime premium." *Id.* Nonetheless, although Petitioners are presumably not willing to return any of the base pay or bonuses they received over the past several years, they now seek retroactively to impose an additional, duplicative obligation on their employers to pay overtime. Imposing an overtime obligation in this case would in no way further the goals of the FLSA: to protect employees from economic coercion while respecting the ability of employers and well-compensated employees to adopt mutually beneficial compensation practices. Rather, it would simply impose a massive retroactive burden on employers that was not contemplated by any party.

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[5] *See also* Economic Research Institute, Pharmaceutical Sales Representative Salary Survey Data, http://tinyurl.com/3qftmae.

B. The Second Circuit's rule would force an inefficient and impractical compensation model on a major national industry.

The rule adopted by the Second Circuit would not only engraft retroactive obligations on pharmaceutical manufacturers; it would also force them to fundamentally restructure their compensation of pharmaceutical sales representatives going forward. As the foregoing suggests, there is good reason that pharmaceutical sales representatives have long been compensated on an exempt basis rather than by the hour: they (like other travelling salespersons) work flexible hours outside their employer's office and their performance is best measured by their impact on sales.

These practicalities, of course, are the very reason for the outside sales exemption. As explained by one oft-cited analysis:

> The reasons for excluding an outside salesman are fairly apparent. Such [a] salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. *To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.*

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941) (emphasis added); *see also Delgado v. Ortho-McNeil, Inc.*, No. 07 Civ. 263, 2009 WL 2781525, at *4 (C.D. Cal. Feb. 6, 2009) ("The Tenth Circuit's holding in *Jewel Tea* is obviously driven by the common-sense notion that it is impractical to make outside salespeople hourly employees due to the lack of supervision and structure in their jobs, and because they generate additional incentive income, usually through commission, instead of overtime.").

The Second Circuit's rule, however, would force just such an "incompatible" hourly compensation model on the industry. Yet these costs would not come with any countervailing benefits to employers or employees; after all, without any change in the supply of or demand for pharmaceutical sales representatives, there is no reason to believe that an hourly-compensation model would alter net compensation to employees. Rather, "either the base pay . . . , or the commission rate, or both, would decline, to offset the overtime premium." *Mechmet*, 825 F.2d at 1176.

This pointless inefficiency demonstrates precisely why the Second Circuit's cramped and formalistic reading of the outside sales exemption is inconsistent with the FLSA's purpose and is thus wrong on the merits. More importantly at this stage, the imposition of such inefficiency on a major national industry also demonstrates the importance of granting certiorari in this case.

C. The rigid, formalistic approach taken by the Second Circuit and the DOL threatens other industries with similarly unwarranted liability.

Although the plaintiffs' bar is currently focused on suits against pharmaceutical manufacturers, it is only a matter of time before the Second Circuit's and the DOL's rigid, formalistic approach is turned on other employers.

As explained above, the outside sales exemption is an inherently *practical* provision, intended to allow employers to avoid obstacles inherent in monitoring the work hours of out-of-office sales employees and to tailor compensation to performance. In refusing to apply the outside salesperson exemption to pharmaceutical sales representatives, however, the Second Circuit (and the DOL's *amicus* brief) elevated formalisms over substance. This approach is inconsistent with the analysis used by other Courts of Appeals and will invite further suits seeking retroactive overtime pay for employees who function in all relevant respects as outside salespeople, yet do not "lawfully transfer ownership" of a product, "take an order for its purchase" or "obtain from [a customer] a binding commitment to [purchase]." *In re Novartis*, 611 F.3d at 154.

For example, in *Gregory v. First Title of America, Inc.*, 555 F.3d 1300, 1308-09 (11th Cir. 2009) (per curiam), a "marketing executive" sued the title insurance company for which she worked, alleging that she was entitled to overtime under the FLSA for her work "inducing realtors, brokers and lenders to begin referring their customers—the end user—on to [her employer] for title insurance services." *Id.* at 1303. The plaintiff argued she was not an outside salesperson because: "she never actually consummated a sale with any person or business," "she never directly sold [her employer's product] to anyone because she was not licensed to do so" and the agents with which she dealt could not make a binding commitment because "the end user of the title insurance has the right to change title insurance companies and shop elsewhere at any given moment." *Id.* at 1303-04 & n.4 These arguments, of course, are precisely the arguments made by Petitioners and the

DOL below, and accepted by the Second Circuit in *In re Novartis*.

Yet the Eleventh Circuit (like the Ninth Circuit below) disagreed. It emphasized that the outside sales exemption should be interpreted in keeping with "the animating spirit" of the FLSA, and that the DOL's own outside sales regulation requires that "'an employee has *in some sense* made a sale.'" *Id.* at 1308 (quoting 69 Fed. Reg. at 162-63). The court then reasoned that the plaintiff had made "a sale in some sense," because "[s]he obtained commitments to buy . . . and, most importantly, was credited with the sale." *Id.* at 1309. Furthermore, "[s]he was hired for her prior sales experience," her "income was directly tied to the number of orders that she brought in" and "[a]ll of her efforts were directed towards the consummation of her own sales and not towards stimulating sales for [her employer] in general." *Id.*

As illustrated by *Gregory*, the Second Circuit's decision in *In re Novartis* does not simply conflict with the decision below. Rather, it is also in tension with the analysis of other Courts of Appeals and invites further litigation against other industries with "unconventionally" structured sales practices. *See also Medtronic, Inc. v. Gibbons*, 527 F. Supp. 1085, 1089 (D. Minn. 1981) (explaining that "[b]ecause of the manner in which cardiac pacemakers reach the ultimate consumer, the cardiac patient," it is "normally the prescribing physicians who determine the kinds of pacemakers that will be inventoried by the hospitals where they perform implantations" and "the marketing activities of the manufacturers are principally directed at the prescribing physicians"); *Delgado*, 2009 WL 2781525, at *4 (discussing *Medtronic*, noting the similarities between the medical device industry and the pharmaceutical industry, and concluding that pharmaceutical sales representatives fit within the FLSA's outside sales exemption).

D. This case provides an important opportunity to clarify the limits of *Auer* deference.

As explained above, in deciding whether to defer to the DOL's *amicus* brief interpreting the outside sales regulation, the Ninth Circuit below and the Second Circuit in *In re Novartis* disagreed over the scope of *Auer* deference. Both courts recognized the same background principles: as a general matter, an agency's interpretation of its own regulation is owed deference, even if reached without notice and comment, 635 F.3d at 392 (citing *Auer*, 519 U.S. at 457); however, "the existence of a parroting regulation" does not entitle an agency to deference when it interprets terms that are common to both a regulation and an underlying statute, *Gonzales*, 546 U.S. at 257; *see also id.* ("An agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language.").

The Second Circuit, however, took an exceedingly narrow view of this parroting exception. It reasoned that the DOL's outside sales regulation did "far more than merely parrot the language of the FLSA," *In re Novartis*, 611 F.3d at 153, because it defined "sale" to include "a transfer of title" and noted that promotion work "may or may not be exempt outside sales work, depending upon the circumstances under which it is performed." *Id.* at

151, 153 (quoting 29 C.F.R. § 541.503(a)). Thus, because the DOL regulation merely listed one example of a transaction "include[d]" in the statutory definition of "sale" and added that *some* promotion work may be non-exempt, the Second Circuit gave controlling deference to the DOL's *amicus* brief.

In contrast, the Ninth Circuit below reasoned that the DOL was not entitled to *Auer* deference because, although the outside sales regulation offered examples of what was *included* in the definition of "sales," it ultimately "cross-reference[d] back to the language of Section 3(k) of the Act—the very language purportedly being defined" and thus "clarifie[d] nothing." 635 F.3d at 394.

This case accordingly offers a valuable opportunity for this Court to clarify the proper scope of *Auer* deference, allowing deference where warranted, but also ensuring appropriate checks on unpredictable and disruptive agency action. The premise of *Auer* deference is that courts will defer to agency positions when the agency has already applied "its expertise and experience" in promulgating the underlying regulation. *Gonzales*, 546 U.S. at 257. In such a situation, the agency has clarified and limited the scope of ambiguous statutory language, has provided notice and an opportunity for comment on this clarification, and has allowed an opportunity for judicial review under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* However, if the parroting exception is not rigorously enforced, agencies will be free to circumvent notice and comment requirements simply by promulgating vague regulations that restate, or only partially illustrate, statutory terms. Regulated parties would have little basis to comment on, challenge, or even seek to understand the full meaning of such regulations.[6] Yet, the agency would then be entitled, under the Second Circuit's view, to controlling deference whenever it purported to "clarify" such regulations in an *amicus* brief. This would be the case even if the agency's "clarification" effected a major policy reversal. Such a rule would undermine the stability and predictability that is so critical to a healthy economic environment. It must be nipped in the bud.

II. This Case Is An Appropriate Vehicle And Further Percolation Is Not Warranted

A square split on the meaning of an important federal statute, which threatens to impose billions of dollars of retroactive damages and pointless inefficiency on the pharmaceutical industry and beyond, is ample justification for certiorari review by this Court. Moreover, at least two additional considerations make prompt review particularly appropriate in this case.

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[6] For similar reasons, this Court has recognized that *Auer* deference is warranted only if the regulation at issue is ambiguous. *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000). Likewise, deference is warranted only if an agency's views reflect its "fair and considered judgment," *Auer*, 519 U.S. at 462, rather than a "convenient litigating position" (something that may be evident where an agency departs from longstanding positions in an *amicus* brief). *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988). Granting certiorari in this case likewise would permit this Court to ensure predictability by clarifying these and other reasonable limits on *Auer* deference.

A. The current circuit split invites forum shopping.

Although Respondents have prevailed in the Ninth Circuit, they have little control over the venue in which plaintiffs' attorneys choose to file future collective action suits. And of course, in light of the decision in *In re Novartis*, future suits are far more likely to be filed in the Second Circuit. This opportunity for forum shopping is particularly troublesome in light of the structure of the pharmaceutical industry; because pharmaceutical manufacturers operate nationwide, they could likely be subject to nationwide collective actions in the Second Circuit, *even for classes that include members located in the Ninth Circuit*. Likewise, even if pharmaceutical manufacturers were to prevail in the additional cases already pending in other circuits, they could *still* be subject to nationwide collective actions in the Second Circuit. In light of these considerations, further percolation would bring little benefit and instead only encourage forum shopping.

Indeed, respondents' highly unusual position of supporting certiorari even though they *prevailed* below underscores the importance to pharmaceutical manufacturers of timely resolution by this Court of the questions presented.

B. Prompt resolution is necessary to prevent substantial retroactive liability.

The DOL's sudden departure from a flexible, purposive interpretation of the outside sales exemption has triggered a flood of cases seeking years of past overtime on behalf of pharmaceutical sales representatives. This Court has long

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recognized that such retroactive liability is disfavored. *Cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Yet many of these cases will soon be litigated to judgment or, if they arise in the Second Circuit, perhaps settled. Were this Court to delay resolution of the questions presented, its decision could come too late to prevent these judgments and settlements. Prompt resolution by this Court is thus necessary to avoid substantial retroactive liability.

III. This Case Would Allow The Court To Reject The Unfounded Trope That Exemptions To The FLSA Must Be Narrowly Construed

Many of the cases addressing the outside sales exemption repeatedly emphasize that, "[b]ecause the FLSA is a 'remedial law,' exemptions to the overtime pay requirement are narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *In re Novartis*, 611 F.3d. at 150 (internal quotation marks omitted); *id.* at 153 (noting that the DOL's position was "consistent with the interpretive canon that exemptions to remedial statutes such as the FLSA are to be read narrowly").

Yet this oft-repeated trope is unsupportable. It is descended from the following statement of the Court in *AH Phillips, Inc. v. Walling*:

> The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. Any exemption from such humanitarian and

> remedial legislation must therefore be narrowly construed . . . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

324 U.S. 490, 493 (1945) (internal quotation marks and citation omitted). This hostile view toward exemptions to "remedial" statutes is thus a corollary to "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

As Justice Scalia has explained, however, this "familiar canon" suffers from serious flaws. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581-86 (1990) ("*Assorted Canards*"). "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). And in deciding how Congress has struck the balance, the goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Scalia, *Assorted Canards, supra* at 582. Of course "that may often be difficult, but [there is] no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales." *Id.*

The corollary spawned in *AH Phillips*, however—that *exemptions* to the FLSA should be narrowly construed—only doubles down on these flaws. Even assuming that remedial statutes should be broadly construed, there is simply no basis to conclude that Congress intended remedial statutes to be extended *in the face of an express exemption*. In such instances, by definition, Congress has explicitly stated that it does *not* wish the statute to be extended broadly.

Indeed, this case provides a particularly telling illustration. In examining close cases at the boundaries of the outside sales exemption, there is no principled basis to assume that Congress would have preferred requiring overtime over allowing compensation through a base salary plus performance bonuses. To be sure, Congress believed that the best way to ensure "a fair day's pay" was to require overtime in *some circumstances*. But Congress likewise believed (as demonstrated by the inclusion of an explicit exemption), that fixed salaries and performance bonuses would better provide fair pay in *other circumstances*. Courts should draw the line between these two sets of circumstances by interpreting the text and purpose of the exemption set out in the FLSA, not by "laying a judicial thumb on one or the other side of the scales." Scalia, *Assorted Canards*, *supra* at 582.

The "anti-employer" canon, however, creates a real risk that courts will pull up short of the careful analysis needed to decide close cases, defaulting instead to the canon as an easy tie breaker. *E.g.* *Alvarez v. IBP, Inc.*, 339 F.3d 894, 905 (9th Cir. 2003) (holding that time spent changing into protective outfits did not "plainly and unmistakably" qualify for the FLSA's exemption for time spent changing "clothing" and that "[a]bsent such a plain and clear . . . fit, [the canon] requires that we construe [the exemption] against the employer seeking to assert it"); *Amendola*, 558 F. Supp. 2d at 472 (distinguishing cases that were factually identical but "d[id] not acknowledge that the FLSA's exemptions must be narrowly construed against employers"). Such an approach truly does "abuse the interpretative process and . . . frustrate the announced will of the people." *AH Phillips, Inc.*, 324 U.S. at 493.

The oft-repeated requirement that FLSA exemptions should be construed against the employer should accordingly be excised from the caselaw. And because this canon is derived from the statements of this Court, only this Court can perform the excision. To be sure, the use of such statements may not constitute an independent basis for certiorari. However, it is worth noting that an additional benefit to review in this case would be the opportunity for the Court to clarify that express exemptions to statutory requirements should be construed "neither liberally to expand nor strictly to constrict . . . but rather . . . precisely right." Scalia, *Assorted Canards*, *supra* at 582.

CONCLUSION

For the foregoing reasons and those stated by respondents, the petition for a writ of certiorari should be granted.

AMICUS
CURIAE
BRIEF

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In the
Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
AND FRANK BUCHANAN,
PETITIONERS,
v.
SMITHKLINE BEECHAM, CORP., D/B/A,
GLAXOSMITHKLINE,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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October 17, 2011

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INTEREST OF *AMICUS CURIAE*[1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines by pharmaceutical and biotechnology research companies. PhRMA closely monitors legal issues that impact the pharmaceutical industry and has frequently participated in cases before this Court.

This petition is extremely important to the pharmaceutical industry. The decision below created a split between the Second and Ninth Circuits over whether pharmaceutical sales representatives ("PSRs") are exempt from overtime pay under the "outside sales" exemption of the Fair Labor Standards Act of 1938 ("FLSA" or "the Act"), 29 U.S.C. § 201 *et seq.* Until this circuit split is resolved, PhRMA members are exposed both to potentially staggering retrospective liability and to uncertainty over whether they must undertake major restructuring that would have significant consequences for the industry and its employees.

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[1] Counsel for all parties have been given notice as required by Rule 37.2(a) and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Pharmaceutical companies employ tens of thousands of PSRs, and throughout the 70 years since the enactment of the FLSA, the settled understanding has been that PSRs are exempt from overtime pay. Two years ago, however, the Department of Labor announced that PSRs were not covered by the FLSA's "outside sales" exemption because, according to the Department's newly-minted interpretation, "sales" require the employee to actually and personally transfer title to goods. As the Ninth Circuit explained in the decision below, this interpretation "transform[ed] what since [the early days of the FLSA had] been recognized as a multi-factor review of an employee's functions into a single, stagnant inquiry." Pet. App. 35a. It also departed without warning from the Department's longstanding acquiescence in the treatment of PSRs as exempt employees.

Rather than initiate a rulemaking to consider prospective changes to the regulatory definition of "sales," the Department simply filed an *amicus* brief announcing its new position. It neither acknowledged the novelty of that position nor attempted to justify upsetting well-settled expectations. Yet the Department claimed that its new position was entitled to "controlling" deference under *Auer v. Robbins*, 519 U.S. 452 (1997).

The Ninth Circuit correctly held that the Department's *amicus*-brief position was not entitled to deference because the regulation that the Department was purporting to interpret merely restated the statute's language and because the Department's position was an unexplained departure from the practical, functional understanding of "sales" that the Department had espoused for 70 years. The Ninth Circuit then concluded that under the statute and regulations, PSRs are exempt "outside sales" employees. This created a split with the Second Circuit, which had held some months earlier that the Department's *amicus*-brief position was owed "controlling" deference under *Auer*. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153–54 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

This circuit split raises a particularly acute need for review due to its practical impact. In addition to threatening massive unforeseen liability, the split creates rampant uncertainty concerning longstanding sales practices and the potential need for major restructuring of the industry's operations. PSRs generally work with little direct supervision, manage their own schedules, and receive substantial performance-based incentive compensation. Pharmaceutical companies could not shift to treating PSRs as non-exempt while keeping these aspects of their jobs unchanged. A shift to non-exempt treatment would impose substantial costs on both pharmaceutical companies and PSRs themselves. For these reasons, even though the decision below is correct, PhRMA submits that it is critical for this

Court to grant review and definitively resolve the issue it presents.

In addition, certiorari is especially appropriate here because underlying the split are two important, unresolved questions regarding the proper scope of *Auer* deference. First, to what extent is deference owed to an agency's interpretation of a regulation that restates or paraphrases statutory language with only minor elaborations or variations? And second, under what circumstances does an agency's change in position about the meaning of a regulation create unfair surprise that vitiates or lessens deference under *Auer*? These questions are important in their own right, even apart from the specific FLSA circuit split they have generated, and the lower courts' struggles with *Auer* make clear that guidance from this Court is needed.

ARGUMENT

I. REVIEW IS NEEDED TO RESOLVE A CLEAR CIRCUIT SPLIT ON A CRITICAL QUESTION AFFECTING THE ENTIRE PHARMACEUTICAL INDUSTRY.

There is now a stark circuit split over whether PSRs qualify for the FLSA's outside sales exemption. That question is of critical importance to the pharmaceutical industry and the tens of thousands of PSRs it employs across all 50 states. Allowing the law in this area to remain unclear would have severe, adverse consequences for the industry and for PSRs themselves.

A. Lower Courts Have Disagreed About Whether PSRs Qualify for the FLSA's Outside Sales Exemption.

PSRs are the pharmaceutical industry's "90,000-person sales force." Pet. App. 26a. Their sales efforts are directed toward physicians because a patient, the "ultimate user" of a prescription drug, cannot purchase that drug "without first obtaining a physician's authorization," *id.* at 3a, and so it is the physician who actually "selects the medication" that is purchased by or for the patient, *id.* at 26a. The PSR's goal is therefore to obtain "a non-binding commitment from the physician to prescribe the PSR's assigned product when medically appropriate." *Id.* at 27a. Regulations and ethical guidelines make this "the absolute maximum commitment" a PSR can obtain from a physician. *Id.* Rather than being strictly limited to 40 hours per week with overtime pay for additional hours worked, PSRs generally are given significant control over their schedules and can receive substantial performance-based incentive compensation.

The FLSA requires that certain employees receive time-and-a-half overtime pay for hours worked in excess of 40 per week, 29 U.S.C. § 207(a)(1), but exempts, *inter alia*, "any employee employed ... in the capacity of outside salesman," *id.* § 213(a)(1). The Secretary of Labor has promulgated regulations that, as relevant here, define "outside salesman" as any employee (1) "[w]hose primary duty is ... making sales within the meaning of section 3(k) of the Act," and (2) "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500. Section 3(k), in turn, provides that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k).

Pharmaceutical companies treat their PSRs as exempt employees and have done so since the position originated more than 70 years ago. Because no one disputes that PSRs are regularly engaged away from their employers' places of business, whether they fall within the outside sales exemption turns on whether their traditional primary duty — obtaining commitments from physicians to prescribe certain drugs when medically appropriate — constitutes "making sales within the meaning of section 3(k)." Until a few years ago, few seriously doubted that it did.

That all changed in October 2009, when the Secretary of Labor announced a new, bright-line rule that a consummated transaction was necessary for a "sale" and declared that under that rule, PSRs do not make "sales" because they do not actually and personally transfer title to the drugs they are selling. *See* Pet. App. 35a. The Secretary announced this new rule, not through rulemaking or any other process providing for notice and public participation, but rather through an uninvited *amicus* brief in the Second Circuit. The Secretary's position departs without explanation from over 70 years of unbroken acquiescence in the industry's classification of PSRs as exempt. It also disregards the Department's longstanding "sensible" and practical approach to the outside sales exemption — an approach still reflected in numerous extant regulations, *see infra* pp. 19–22 — in favor of a "rigid, formalistic interpretation" that pulls the rug out from under pharmaceutical companies and their well-settled expectations. Pet. App. 28a. Nonetheless, the Secretary argues that courts must defer to her new position.

In the decision below, the Ninth Circuit rejected that argument. After concluding that the Secretary's position did not merit deference, the court held that PSRs *do* make sales within the meaning of the FLSA and are therefore exempt outside salespersons. It reasoned that in light of "the structure and realities of the heavily regulated pharmaceutical industry ... [i]n this industry, the 'sale' is the exchange of non-binding commitments between the PSR and the physician." Pet. App. 25a–26a. The Second Circuit, however, came to the opposite conclusion. It held that the Secretary's position was "not plainly erroneous" and was therefore "entitled to 'controlling' deference." *Novartis*, 611 F.3d at 153–54.

Thus, there is now a clear circuit split on the question whether PSRs qualify as outside salespersons. This split casts a shadow over the entire pharmaceutical industry because, as the Ninth Circuit noted, regardless of which company they work for, regulatory and ethical barriers prevent PSRs who call on physicians who write prescriptions for drugs that patients fill through a pharmacist from transferring title to those drugs to those physicians. *See* Pet. App. 8a. The split extends to the federal district courts, which have issued similarly conflicting rulings.[2]

B. Continuing Uncertainty About Whether PSRs Are Exempt Outside Salespersons Will Have Severe Consequences For The Pharmaceutical Industry And PSRs Themselves.

Pharmaceutical companies have structured their sales operations in reliance on their uniform understanding that PSRs are exempt. If the circuit split is not resolved, companies may be forced to undertake major restructuring that would be difficult and costly both for the industry and for PSRs themselves, whose jobs may be rendered far less attractive.

PhRMA's members can take little comfort from the Ninth Circuit's well-reasoned decision so long as there is directly conflicting authority from the Second Circuit. Most companies have operations and employ PSRs nationwide, and it is not practical for them to radically alter their employment classifications and practices on a circuit-by-circuit basis to comply with conflicting judicial pronouncements. In any event, such circuit-by-circuit restructuring would not solve the problem of forum-shopping. The Ninth Circuit's decision has not even prevented plaintiffs' attorneys from attempting to include PSRs who live and work within the Ninth Circuit in proposed nationwide classes in new cases filed within the Second Circuit. *See, e.g.*, Complaint at 6, *Reissner v. Boehringer Ingelheim Pharm., Inc.*, No. 11-1576 (D. Conn. Oct. 13, 2011) (class action on behalf of "[a]ll PSR employees who worked for Defendant nationwide within the last three years").

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[2] *See, e.g.*, *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740 (N.D. Ill. 2010) (exemption does not apply), *appeal docketed*, No. 11-1980 (7th Cir. Apr. 28, 2011); *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674 (S.D. Ind. 2009) (exemption applies), *appeal docketed*, No. 10-3855 (7th Cir. Dec. 13, 2010); *Harris v. Auxilium Pharm., Inc.*, No. 07-3938, 2010 WL 3817150 (S.D. Tex. Sept. 28, 2010) (exemption does not apply), *appeal docketed*, No. 11-20151 (5th Cir. Jan. 24, 2011); *Delgado v. Ortho-McNeil, Inc.*, No. 07-00263, 2009 WL 2781525 (C.D. Cal. Feb. 2, 2009) (exemption applies), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009).

Dozens of FLSA cases have been filed in recent years against pharmaceutical companies, almost all cast as class actions. The potential amount of retrospective liability from these cases is staggering; plaintiffs' counsel in one suit involving just 2,500 PSRs estimated that damages from that suit alone could reach $100 million. *See* Mark Hamblett, *2nd Circuit Finds Novartis Drug Reps Not Exempt From Overtime Law* (July 7, 2010), http://www.law.com/jsp/article.jsp?id=1202463314353. If so, the industry as a whole faces potential liability in the billions of dollars.

For all these reasons, as a practical matter, any reclassification of PSRs would likely have to occur on a nationwide basis. Reclassification would be costly and painful for all concerned because key aspects of PSRs' jobs, as they are currently structured, are fundamentally incompatible with treating PSRs as hourly employees.

First, PSRs generally operate with little direct supervision. As one court explained, PSRs "spend the great majority of their time out of the office. They are not generally subject to direct supervision while they go about their business. They do not report to work first thing in the morning and clock in. They have a large degree of autonomy, which would make it more difficult to make them accountable for every minute of their day." *Delgado v. Ortho-McNeil, Inc.*, No. 07-00263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009). Pharmaceutical companies ordinarily give PSRs wide freedom to structure their schedules as they see fit. This was exemplified by one plaintiff who "worked without direct hour-to-hour, day-by-day supervision" and was never "told ... how many hours she should work in any given week." *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp. 2d 674, 679, 688 (S.D. Ind. 2009).

Second, most PSRs are eligible to receive substantial performance-based incentive compensation. Many pharmaceutical companies track the number of prescriptions issued by physicians and use those sales figures as a factor in determining PSRs' incentive compensation. *See id.* at 686–88. Thus, "[t]he object of [PSRs'] harder work [is not] to garner overtime, it [is] to generate sales." *Delgado*, 2009 WL 2781525, at *3.

These are the very job characteristics that led Congress to exclude outside salespersons from the overtime requirement. As the Tenth Circuit explained in a seminal case interpreting the outside sales exemption just a few years after it was created:

> The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207–08 (10th Cir. 1941).

The fundamental incompatibility of the outside salesperson's job with the FLSA's overtime pay requirement points to the difficulty of reclassifying PSRs without radically transforming their job descriptions. Simply put, "[i]t is impractical to make [PSRs] hourly employees due to the lack of supervision and structure in their jobs, and because they generate additional incentive income ... instead of overtime." *Yacoubian v. Ortho-McNeil Pharm.*, *Inc.*, No. 07-00127, 2009 WL 3326632, at *4 (C.D. Cal. Feb. 6, 2009).[3]

Not only would reclassifying PSRs impose major costs on pharmaceutical companies, it would also have a severe impact on the lives of tens of thousands of PSRs nationwide. PSRs are well-paid, highly-trained sales employees. The vast majority of them have never asked to be classified as hourly workers under the FLSA, and for good reason: Most PSRs enjoy the benefits associated with their exempt classification, including the ability to operate with minimal day-to-day supervision, set their own schedules, and manage their territories. It is telling in this respect that so many of the named plaintiffs in FLSA actions against pharmaceutical companies are *former*, not current, PSRs. Yet the freedom and autonomy prized by many PSRs will have to be curtailed significantly if pharmaceutical companies must treat PSRs as non-exempt and pay them on a strict hourly basis.

Likewise, many PSRs value the industry's traditional, incentive-based compensation structure. Besides giving them a sense of ownership and investment in their work, this compensation regime enhances PSRs' well-being in a more concrete way: It enables many successful PSRs to earn highly competitive salaries, often reaching six figures. If, however, a persistent circuit split compels pharmaceutical companies to reclassify PSRs and pay them overtime, this incentive-based compensation structure will likely have to be replaced with a more rigid, hours-based system. It is far from clear that PSRs — especially skilled and motivated ones — would be better off.[4]

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[3] The autonomy, incentive compensation, and other factors that make PSRs prototypical outside salespersons may also bring PSRs within other FLSA exemptions not implicated by the petition here. *See, e.g.*, 29 C.F.R. § 541.200 (exemption for administrative employees); *id.* § 541.601 (exemption for highly compensated employees); *Smith v. Johnson & Johnson*, 593 F.3d 280 (3d Cir. 2010).

In light of the detailed analysis given this issue by two courts of appeals and numerous district courts, there is little to be gained by awaiting further development. On the other hand, delay in resolving this stark circuit split would leave the pharmaceutical industry in a continuing state of uncertainty regarding its exposure to potentially staggering retrospective liability and its potential need to undertake major, nationwide restructuring that would carry substantial costs for both pharmaceutical companies and PSRs themselves. Because the current circuit split leaves the industry in an untenable position, the Court should grant review now.

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[4] Moreover, the transformation of PSRs' jobs by eliminating or curtailing the attractive elements of autonomy and incentive-based compensation may well affect the industry's ability to recruit highly qualified and motivated individuals for these positions.

II. REVIEW IS ALSO WARRANTED BECAUSE OF THE IMPORTANCE OF THE *AUER* DEFERENCE ISSUE UNDERLYING THE SPLIT.

The circuit split over whether PSRs are exempt outside salespersons derives from confusion about the proper application of this Court's decision in *Auer*, which directs courts to defer to an agency's interpretation of its own regulations that is not "plainly erroneous or inconsistent with the regulation." 519 U.S. at 461. Without such deference, the Secretary's interpretation of "sales" as used in section 3(k) as including a rigid transfer-of-title requirement plainly could not prevail.

This case thus provides an opportunity for the Court to clarify two questions that the lower courts have struggled with in applying *Auer*: First, to what extent is deference owed to an agency's interpretation of a regulation that restates or paraphrases statutory language with minor elaborations or variations? And second, under what circumstances does an agency's change in position about the meaning of its regulations create unfair surprise that vitiates or lessens deference under *Auer*?

Both issues are vital to containing *Auer* deference within its proper limits. As Justice Scalia pointed out in urging the Court to revisit *Auer*, extending *Auer* deference uncritically has the potential to "promote[] arbitrary government" by "encourag[ing] the agency to enact vague rules which give it the power ... to do what it pleases." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2266

(2011) (concurring opinion). This case exemplifies the dangerous incentives that can be created by misapplying *Auer*. If an agency can get "controlling deference" to its desired position by simply promulgating a regulation that does little more than restate statutory language and then announcing a surprising new interpretation in the midst of pending litigation, agencies can hardly be expected to resist the temptation to proceed in that manner and dispense with the rulemaking process. The rulemaking process, however, protects critical interests in notice, predictability, and public participation. *See id.* Shortcuts amounting to ambush-by-*amicus*-brief should not be encouraged by extending "controlling deference."

A. This Court Should Clarify That *Auer* Deference Does Not Apply When A Regulation Parrots Statutory Language With Only Minor Elaborations Or Variations.

This Court has stated that *Auer* does not apply when an agency interprets a regulation that "does little more than restate," "summarize," "paraphrase," or otherwise "parrot[]" statutory language. *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). As the Court explained, *Auer* deference is appropriate only when an agency offers its views on the meaning of regulatory language that *the agency itself* selected "using its expertise and experience." *Id.* When regulatory language parrots a statute, "the question ... is not the meaning of the regulation but the meaning of the statute." *Id.* An agency's interpretation of a statute carries no "special authority" when it is announced in an *amicus* brief, *id.*; rather, an agency must employ notice-and-comment rulemaking or comparable procedures to obtain *Chevron* deference for its statutory interpretations. *See Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

Gonzales' "parroting" rule provides an important check on agencies' ability to perform an end-run around notice-and-comment rulemaking. But as explained below, there is broad confusion among lower courts about the rule's proper application when a regulation borrows critical language from a statute but does not track the statute precisely.

The regulation at issue here provides:

> Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that 'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 C.F.R. § 541.501(b). The second sentence of the regulation simply repeats the statutory definition. The first sentence lists examples of transactions that are "include[d]" within the definition, but does not purport to define or limit the statutory language. Because the regulation falls back on the statutory definition of "sale," the Secretary's views regarding whether particular activities are "sales" tells us no more than what the Secretary thinks the *statute* means.

The Secretary may be able to obtain deference under *Chevron* — not *Auer* — to her view of what the statute means, but only if she goes through notice-and-comment rulemaking and announces her view in a form that carries the force of law. *See Christensen*, 529 U.S. at 587. But under a proper application of *Gonzales*, the Secretary's view of what the statute means is not entitled to *Auer* deference. First, because Congress, not the Secretary, wrote the words at issue, the Secretary can make no claim to special insight into what the author of those words meant. Second, the Secretary can make no claim to deference to her policy judgments where she has avoided the process required to trigger deference to such judgments under *Chevron*. It would be perverse to afford "controlling deference" under *Auer* to a view announced in an *amicus* brief that unquestionably would not be eligible for deference under *Chevron* where the regulation that the agency purports to interpret does little more than track the statutory language.

The Second Circuit nonetheless concluded that section 541.501(b) did "far more than merely parrot the language of the FLSA" and that, therefore, the Secretary's interpretation of "sales" commanded "controlling" deference. *Novartis*, 611 F.3d at 153. The Ninth Circuit disagreed. Concluding that the regulation's first sentence was "open-ended" and the second sentence merely "direct[ed] employers, employees, and this court back to the language of the FLSA," the Ninth Circuit held that the Secretary's interpretation of "sales" was not entitled to *Auer* deference. Pet. App. 22a–23a.

Unfortunately, the Second Circuit is not alone in its misinterpretation of *Gonzales*; other courts of appeals have fallen into the same trap of reflexively extending *Auer* deference based on minor variations or elaborations on statutory language contained in what are essentially "parroting" regulations. *See Massachusetts v. Sebelius*, 638 F.3d 24, 34 (1st Cir. 2011) (regulation's substitution of "claims for services" for statutory phrase "payment for services" meant that *Auer* deference applied); *Haas v. Peake*, 525 F.3d 1168, 1187 (Fed. Cir. 2008) (substitution of "duty or visitation in the Republic of Vietnam" for "serv[ice] in the Republic of Vietnam" meant that *Auer* deference applied); *Plateau Mining Corp. v. Fed. Mine Safety & Health Rev. Comm'n*, 519 F.3d 1176, 1193 (10th Cir. 2008) (omission of phrase "render harmless" from regulation that otherwise quoted statute verbatim meant that *Auer* deference applied); *Sierra Club v. Johnson*, 436 F.3d 1269, 1280–81 (11th Cir. 2006).

Other decisions, however, have applied *Gonzales* more rigorously. *See Groff v. United States*, 493 F.3d 1343, 1350 n.2 (Fed. Cir. 2007) (no *Auer* deference for agency's interpretation of regulation that restated statutory definition of "public safety officer" but also listed particular examples of officers falling within the statutory definition).

That the Second and Ninth Circuits considered the *same regulation* and came to opposite conclusions demonstrates the need for this Court to clarify when an agency's interpretation of statutory language, restated or paraphrased in a regulation, is entitled to *Auer* deference.

B. This Court Should Clarify That *Auer* Deference Does Not Apply Where An Agency's Change In Position Upsets Settled Expectations.

The split here also reflects lower courts' confusion as to whether *Auer* deference is proper when an agency announces an interpretation of a regulation that upsets reasonable expectations.

1. The Secretary's *Amicus* Brief Reflects an Unexplained Change in the Secretary's Interpretation of "Sales."

The Secretary's position that PSRs do not make "sales" within the meaning of section 3(k) depends on her newly-restrictive definition of "sale" that requires a fully consummated transaction. *See* Pet. App. 35a. That new understanding of "sale" was announced for the first time in an *amicus* brief in 2009. Even if one indulges the fiction that that position meaningfully constitutes an interpretation of regulatory language written by the Department — as opposed to an interpretation of statutory language not eligible for *Chevron* deference or simply a freestanding policy preference — the Secretary's new position is an about-face from the flexible, functional understanding of "sale" that the Department has espoused for decades.

In 1940, the Department promulgated regulations making clear that an "outside salesman" must make "sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5 (1940). Section 3(k), in turn, defined "sale" in flexible and expansive terms to "*include*[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other* *disposition*." 29 U.S.C. § 203(k) (emphases added). The Department underscored this non-technical approach by explaining that a "salesman [must] *in some sense* make a sale." Dep't of Labor, *Executive, Administrative, Professional, Outside Salesman Redefined* (Oct. 10, 1940) ("Stein Report") at 45–46 (emphasis added). Nothing in the regulatory or statutory language hinted at the hypertechnical reading now pressed by the Department.

In 1970, the Department reiterated this flexible understanding when it promulgated 29 C.F.R. § 779.241, addressing the same "statutory definition of the term 'sale' or 'sell'" in section 3(k) that is at issue here. In that regulation, the Department took a broad and explicitly practical approach that is the polar opposite of its new view:

> As long as the employee *in any way participates* in the sale of the goods he will be considered to be "selling" the goods, whether he physically handles them or not. Thus, if the employee performs any work that, *in a practical sense* is an essential *part* of consummating the "sale" of the particular goods, he will be considered to be "selling" the goods.

29 C.F.R. § 779.241 (emphases added). The Department's *amicus* brief did not even acknowledge, much less successfully explain away, this expansive understanding of a "sale" in its own still-extant regulation.

Next, in its 2004 rulemaking, the Department emphasized that it "did not intend any substantive changes" in the outside sales exemption. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,161 (Apr. 23, 2004). Indeed, the Department explicitly reaffirmed the statement in the 1940 Stein Report that the employee need only make a sale "in some sense." *Id.* at 22,162.

The pharmaceutical industry's uniform treatment of PSRs as exempt employees is consistent with the Department's former, expansive understanding of "sales." Not only did the Department not contest that treatment, it positively encouraged it: The Department's own publication defined "pharmaceutical detailer" as an occupation that "[p]romotes use of and *sells* ethical drugs and other pharmaceutical products to physicians" — all in a section titled, "*Sales Occupations*, Chemicals, Drugs, and Sundries." Dep't of Labor, Dictionary of Occupational Titles § 262.157-010 (4th ed. 1991) (emphases added), *available at* http://www.oalj.dol.gov/libdot.htm.

The Department's longstanding acquiescence in the industry's treatment of PSRs confirms what the Department repeatedly said — that it was interpreting "sales" in a broad, functional manner. Any notion that the industry uniformly misread the regulation or misunderstood the Department's interpretation for 70 years and yet the Department never said anything, in any manner, to suggest it disagreed is simply too much to swallow. As Judge Posner explained, while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible hypothesis is that the ... industry has been left alone" because it was compliant. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007).[5]

2. There Is Uncertainty Over The Circumstances In Which Changes In Position Create Unfair Surprise And Undermine *Auer* Deference.

This Court has stated on many occasions that "an agency's interpretation of a ... regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)) (internal quotation marks omitted); *see also, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001); *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *Watt v. Alaska*, 451 U.S. 259, 273 (1981). Likewise, the Court has warned that a new interpretation does not merit deference when it results in "unfair surprise." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007). And in recent decisions, this Court has continued to treat consistency as an important factor in the decision whether to afford *Auer* deference. *See Talk Am.*, 131 S. Ct. at 2263–65; *Chase Bank v. McCoy*, 131 S. Ct. 871, 881 (2011).

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[5] The pharmaceutical industry was not alone in relying on the Department's practical, non-technical understanding of "sales" and will not be alone in suffering disruption and costs if this Court does not resolve this split. *See, e.g.*, *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1303, 1308–09 (11th Cir. 2009) (employee whose job was inducing realtors, brokers, and lenders to begin referring their customers to employer for title insurance services was exempt outside salesperson).

Consistency is important for at least two reasons. First, an unexplained departure from an agency's longstanding interpretation of its regulation "is likely to reflect the agency's reassessment of wise policy rather than a reassessment of what the agency itself originally meant," *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), and an agency's policy views do not merit controlling *Auer* deference. Second, regulated entities structure their affairs on the assumption that an agency will not suddenly and without explanation abandon its long-held views. An agency may not "under the guise of interpreting a regulation, ... create *de facto* a new regulation" and thereby circumvent the required notice and public participation. *Christensen*, 529 U.S. at 588.

Here, the Secretary's new, formalistic interpretation of "sales," announced not through notice-and-comment rulemaking but in an unsolicited *amicus* brief in a private lawsuit, upends 70 years of settled expectations for the entire pharmaceutical industry and tens of thousands of PSRs and threatens the industry with massive retrospective liability. As the Ninth Circuit recognized, courts should not afford any deference — let alone "controlling" deference — to such an "about-face regulation, expressed only in *ad hoc* amicus filings," that departs from "decades of DOL nonfeasance and the consistent message to employers that a salesman is someone who 'in some sense' sells." Pet. App. 35a.[6]

Lower courts, however, have struggled to determine whether or to what extent *Auer* deference applies when an agency has changed its position about the meaning of its regulations or announced a new position that creates unfair surprise. Some courts have flatly declared that *Auer* deference is due only when the agency's "position is not inconsistent with [its] prior statements and actions regarding the disputed regulation." *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002); *see also U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 986 (11th Cir. 2004) (*Auer* deference applies only to a "constant and unchanging" agency interpretation).[7]

---

[6] Other industries may encounter similar problems given the Department of Labor's abandonment of its longstanding practice of issuing opinion letters offering employers advance guidance on the application of the FLSA, *see* Wage & Hour Div., U.S. Dep't of Labor, Final Rulings and Opinion Letters, http://www.dol.gov/WHD/opinion/opinion.htm (last visited Oct. 17, 2011), and simultaneous "reinvigorat[ion of] its *amicus* brief practice," *see* Richard Renner, *Solicitor of Labor Patricia Smith Speaks About Policy*, http://www.whistleblowersblog.org/2010/06/articles/department-of-labor-1/solicitor-of-labor-patricia-smith-speaks-about-policy/ (June 25, 2010).

[7] Some courts of appeals have gone further and held that "the APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation." *Shell Offshore, Inc. v. Babbitt*, 238 F.3d 622, 629 (5th Cir. 2001); *see also, e.g., Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997). Other courts have disagreed. *See United States v. Magnesium Corp. of Am.*, 616 F.3d 1129, 1139 (10th Cir. 2010) (noting "circuit split" and citing cases). This divide further underscores

Other courts have been less explicit in describing consistency as a precondition to *Auer* deference but have noted the consistency (or not) of an agency's interpretation in justifying decisions to defer (or not). *See, e.g.*, *Tex. Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 777 (5th Cir. 2010). Still other courts, citing *Coke*, have extended full *Auer* deference to any regulatory interpretation — even a novel or inconsistent interpretation — that the court did not believe resulted in "unfair surprise." *See Boose v. Tri-County Metro. Transp. Dist.*, 587 F.3d 997, 1005 n.13 (9th Cir. 2009); *Haas*, 525 F.3d at 1190.

Two cases exemplify lower courts' struggles with this issue. In *Taylor v. Progress Energy, Inc.*, 493 F.3d 454 (4th Cir. 2007), the panel majority, citing *Thomas Jefferson*, declined to defer to a regulatory interpretation offered by the Department of Labor in an *amicus* brief in part because it was "inconsistent with what the DOL said it intended the regulation to mean at the time it was promulgated." *Id.* at 461. Meanwhile, the dissenting judge, citing *Coke*, was "unpersuaded by any suggestion that the inconsistencies in the DOL's interpretation of the regulation over time must lessen the level of deference." *Id.* at 464 (Duncan, J.). Similarly, in *Abbott Laboratories, Inc. v. United States*, 573 F.3d 1327 (Fed. Cir. 2009), the court first stated that "an agency's inconsistent interpretation of its regulation detracts from the deference we owe to that interpretation," *id.* at 1330, but then declared that

---

the need for guidance on the impact of changes in an agency's regulatory interpretations.

"the fact that that the government 'may have interpreted these regulations differently at different times in their history' is of no import 'as long as interpretative changes create no unfair surprise,'" *id.* at 1333 (quoting *Coke*, 551 U.S. at 170–71). The court did not explain how inconsistency could "detract[] from ... deference" while simultaneously being "of no import."

That the Second and Ninth Circuits reached diametrically opposite conclusions about the deference owed to the Secretary's newly-minted interpretation of "sales" confirms what the lower-court decisions discussed above illustrate — that there is a pressing need for this Court to clarify the proper scope of *Auer* deference when a shift in an agency's regulatory interpretation upsets settled expectations. This case is a clear opportunity to provide that much-needed guidance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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October 17, 2011

JOINT APPENDIX

5

Supreme Court,
FILED
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OFFICE OF THE C

No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
and FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A GLAXOSMITHKLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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APPENDIX A — RELEVANT DOCKET ENTRIES

U.S. DISTRICT COURT FOR ARIZONA, PHOENIX
COURT OF APPEALS DOCKET #: 10-15257

Docketed: 02/04/2010
Termed: 02/14/2011
Nature of Suit: 3710 Fair Labor Standards Act
Michael Christopher, et al
v. Smithkline Beecham Corporation
Appeal From: U.S. District Court
for Arizona, Phoenix
Fee Status: Paid

02/04/2010	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL.
09/01/2010	43	Filed order (Appellate Commissioner) Appellees' motion to strike the brief submitted by the Secretary of Labor is denied.
10/19/2010	56	Filed clerk order (Deputy Clerk:WL): The Secretary of Labor's motion to participate in oral argument as amicus curiae in support of Plaintiffs-Appellants is GRANTED. [7514443] (WL)
11/03/2010	60	ARGUED AND SUBMITTED TO MARY M. SCHROEDER, RICHARD C. TALLMAN and MILAN D. SMITH, JR.. [7533152] (BG)

02/14/2011	61	FILED OPINION (MARY M. SCHROEDER, RICHARD C. TALLMAN and MILAN D. SMITH, JR.) AFFIRMED.Judge: MDS Authoring. FILED AND ENTERED JUDGMENT. [7646631] (RP)
03/07/2011	66	Filed (ECF) Appellants Frank Buchanan and Michael Shane Christopher petition for panel rehearing and petition for rehearing en banc (from 02/14/2011 opinion). Date of service: 03/07/2011. [7671674] (MRP)
03/24/2011	67	Submitted (ECF) Amicus brief for review. Submitted by Amicus Curiae Hilda L. Solis. Date of service: 03/24/2011. [7693738] (SJS)
05/17/2011	71	Filed order (MARY M. SCHROEDER, RICHARD C. TALLMAN and MILAN D. SMITH, JR.) The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED. [7754640] (KKW)

Appendix A

U.S. DISTRICT COURT
DISTRICT OF ARIZONA (Phoenix Division)
CIVIL DOCKET FOR CASE #: 2:08-cv-01498-FJM

Christopher et al v. SmithKline Beecham Corporation
Assigned to: Judge Frederick J Martone
Case in other court: Ninth Circuit, 10-15257
Cause: 29:201 Fair Labor Standards Act

Date Filed: 08/14/2008
Date Terminated: 11/20/2009
Jury Demand: Plaintiff
Nature of Suit: 710 Labor: Fair Standards
Jurisdiction: Federal Question

08/14/2008	1	COMPLAINT. Filing fee received: $ 350.00, receipt number 0970000000002153526, filed by Michael Shane Christopher, Frank Buchanan.(Pruitt, Michael) (Entered: 08/14/2008)
10/28/2009	91	Notice re Filing of Supplemental Authority in Support of Plaintiffs' Response to Defendant's Motion for Summary Judgment and Plaintiffs' Cross Motion for Partial Summary Judgment by Frank Buchanan, Michael Shane Christopher re 75 MOTION for Partial Summary Judgment (Attachments: # 1 Exhibit Brief for the Secretary of Labor as Amicus Curiae in Support of

		Plaintiffs-Appellants filed in action In Re Novartis Wage and Hour Litigation)(Pruitt, Michael) (Entered: 10/28/2009)
11/20/2009	93	ORDER - IT IS ORDERED GRANTING GSK's 52 Motion for Summary Judgment and DENYING plas' 75 Cross-Motion for Summary Judgment. FURTHER ORDERED DENYING plas' 29 Motion for conditional class certification as moot, and DENYING plas' 83 Motion to supplement the record as moot. The clerk shall enter final judgment. Signed by Judge Frederick J Martone on 11/20/09. (SAT) (Entered: 11/20/2009)
02/01/2010	99	ORDER denying 96 Motion to alter or amend the judgment. Signed by Judge Frederick J Martone on 1/29/10. (DMT) (Entered: 02/01/2010)
02/03/2010	100	NOTICE OF APPEAL to 9th Circuit, as to 93 ORDER on Motion, 94 CLERK'S JUDGMENT, 99 ORDER on Motion by Frank Buchanan, Michael Shane Christopher. Filing fee received: $ 455.00, receipt number 0970-3592971. (Pruitt, Michael) Modified on 2/5/2010 (SAT). DOCKET TEXT MODIFIED TO ADD LINKAGE ONLY. (Entered: 02/03/2010)

APPENDIX B —DEPOSITION OF MICHAEL SHANE CHRISTOPHER IN THE UNITED STATES DISTRICT COURT OF ARIZONA, DISTRICT OF ARIZONA, DATED APRIL 22, 2009

IN THE UNITED-STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CV-01498-FJM

Michael Shane Christopher, filing individually and on behalf of others similarly situated; and Frank Buchanan, filing individually and on behalf of all others similarly situated;

Plaintiffs,

versus

SmithKline Beecham Corporation,
d/b/a GlaxoSmithKline;

Defendant.

DEPOSITION OF:
MICHAEL SHANE CHRISTOPHER

TAKEN ON: April 22, 2009

* * *

[18] Q Upon what type of prescribers do you call?

A General practitioners, family physicians.

Q Could you compare for us your job duties at Inventiv with your job duties at GlaxoSmithKline.

MR. PRUITT: Objection. Form.

Answer if you can.

THE WITNESS: Do you want me to compare the two?

BY MS. JOHNSON:

Q Yes.

A Within both positions --

Q Yes, sir.

A --I promote and market the assigned medications for Inventiv and then various products for GlaxoSmithKline; go to doctors' offices that are assigned to me; see those physicians; market and promote the materials that we have been given as far as approved messages, core messages, that we are to share with physicians, nurse practitioners, PA's, -- in the variety of geographies that I've held in both positions.

[33] Q Do you recall -- did you meet with one recruiter or two recruiters? You mentioned two job 10 fairs that you went to?

A Ironically, it was the same recruiter, Jeff—Jeff Hoch.

Q Okay. And do you recall what Mr. Hoch told you about the position that was available?

A Initially, he told me didn't have any experience.

Q Okay. Anything else other than that you didn't have any - what did he tell you about the job, though?

A Pretty much I sat down; he told me I didn't have any experience, I needed to go to sell copy machines or go to work for Enterprise and rent cars. That was -- that was the biggest thing that stuck out to me.

Q Do you recall why -- did he explain why he thought those experiences would be beneficial to you in enhancing your probability of getting a job?

A I re--I slightly recall I think he mentioned that the training that those companies provided was very integral and--and in depth and could benefit me as far as the way I would promote and market medications for GSK.

***

[57] Q is Christopher Exhibit 10 a copy of an email that you sent to certain people within GSK, dated May 30th, 2003, with the subject "The Beginning"?

A Yes.

Q "Hello, I just wanted to say 'Thank You' to each and every-"—"each and everyone of you for the effort you have made to make me feel like a HUGE part of the TEAM. I feel as if I have been working with you for years, and that feeling is wonderful. I have enjoyed my very 1st week working with 'The Greatest Sales Team in America.' I have been waiting anxiously for this week and now that it is here, I expect to make a positive impact on our goal, our market share, our strategies, and our overall focus...Making Doctors feel confident in prescribing GSK's products. Enough of the soft hearted stuff. I hope everyone has a wonderful weekend and I will see ya next week. -MSC." Did I read that correctly?

A Correct.

* * *

[89] Aside from that, there are things that I look at, read, and study for my own personal knowledge, aside from work, and I assume that most people do that.

* * *

[92] Q So wasn't part of what you were doing to help the physician understand the value of GSK products over competitors' products and for appropriate patients to prescribe GSK products?

A It was my position that I was trained on particular products and I was to promote and market those products based on designated messages from materials that were provided from GlaxoSmithKline, that were approved not only by GlaxoSmithKline but the FDA and all the legal parameters that go behind that.

Q Uh-huh.

A That was my position.

Q I understand your position, but I'm not sure if you answered my question. So I'm going to go back and ask my question again.

A Sure.

Q Okay. Isn't it true -- you can use the term "promote" -- we can use the term "promote," but in promoting to physicians, wasn't your objective to get the physician to prescribe a GSK product for appropriate patients as opposed to a competitor's product?

[93] Wasn't that your objective?

A It was my position to give the information that I was provided as a resource from GlaxoSmithKline to give to the physician.

Q Why?

A What the physician does as far as what prescriptions he writes is totally up to him. I'm not even there when he writes a prescription.

Q Right.

A In addition to that, if he were to write a GSK prescription for any of the GSK products, it's then up to the patient to take that prescription to any pharmacy of their choosing --

Q Right.

A -- and then at the pharmacy level, it's up to the patient and the pharmacy to either give that prescription out as written or to dispense a generic.

So there's a string of events -

Q Right.

A -- that I am in no shape, form --

Q I --

A -- related to.

Q I understand there's a string of events that you're not part of, but I don't think you've [94] answered my question.

Let me -- let me just ask it again.

A Okay.

Q And I understand you've given us a lot of information.

A And it may be the same answer.

Q Well, it can be the same answer, but it's still nonresponsive.

Because my question is isn't it true that your role was to present information to a prescriber about the benefits of GSK's product with the objective of getting that prescriber to prescribe a GSK product for the appropriate patient, regardless of what happened afterwards?

MR. PRUITT: Objection. Form.

MS. JOHNSON: Okay.

BY MS. JOHNSON:

Q You can answer.

A It was my position to supply information --

Q Right.

A -- that I was trained on and that I was taught and that I was instructed to deliver to the physician.

* * *

[105] Q But your objective is to influence them to do something; correct?

A I wanted to give them the -- the best information that I had on my products --

Q Right.

A -- that I promoted for GSK to have -- that he can make a distinction of what to do --

Q With the object --

A -- for his patients.

Q -- with the objective that you go to, in your close, of asking them to write a prescription, whether they do or not -- your objective was to ask them to write a prescription for a GSK product.

MR. PRUITT: Objection. Form.

BY MS. JOHNSON:

Q Correct? Go ahead.

A I provided information for them.

Q And you had no -- all you did was to provide information, and you had no objective other than to provide the information?

A That's all we do. We don't sell them a product. We don't sell them a service. And -- and I apologize. Maybe I just totally --

***

[106] Q Because you said to me--I believe I understood you to testify that one of the things that you were taught to do in training by GSK is to ask the physician, regardless of their response, to write a prescription for a GSK product; and maybe that's the way I can ask the question. Isn't it true that, as part of your training with GSK, you were trained to ask a prescriber to write a prescription for a GSK product? Regardless of whether they did or not, is that a true statement?

A There was training to ask for commitment from a physician to either read a clinical, write prescriptions, go to a dinner program, attend a weekend convention. There were multiple questions that we were asked to ask our physicians.

Q Perfect. And one of those questions was to ask them to write a prescription; correct?

A For a GSK product?

Q Yes.

A Yes.

* * *

[110] Q I'd like to ask you some questions about the interactions that you had with other people on your pod.

Can you explain what a "pod" is or at least what a pod -- or how a pod operated during the time you worked for GSK.

A My knowledge of the way that it's assigned [111] is you have a geography of physicians. Within that geography, you have GlaxoSmithKline representatives, and it could be three representatives; it could be five; it could be six.

It -- it's constantly changing as opposed to how many representatives are within a geography at any given point.

Within that group of GSK representatives, it's just layman terms it's a pod or -- yeah. I think they just classified it as a "pod."

And we worked together to make sure -- because some products you shared with other representatives; so there was some -- some crossover as far as the products being promoted.

And in order to kind of not overwhelm a physician on the same product with the same information, given in the same day, we came up with a -- a routing plan to say, for instance, let's go -- because, according to Exhibit 15, we'll go with Mari Moga. She and I promoted Wellbutrin XL together.

So, for instance, when I had the territory with GlaxoSmithKline in Arizona, we covered Scottsdale, Sedona, Flagstaff. For instance, Mari would go north to Flagstaff, and I would be in [112] Scottsdale. And depending on -- and I can't recall if it was two or three weeks of routing adjustments -- she would be in "Flag," I would be in Scottsdale.

Then, conversely, the next week, she would be in Scottsdale; I would be in "Flag."

* * *

[139] [Q] You -- how did you go about asking for commitment? Or what kind of commitments did you ask for from your customers?

A I think I shared a couple of those with you [140] a while back.

Q I'd like you to share as many as you can recall.

A Asking for commitments to read clinical reprints that I provided for them, ask them to recall formulary tier status with certain GSK products, ask for commitments on disease states that they would consider utilizing GSK products for those disease states that were obviously approved for usage in that patient population.

I would ask for commitment from physicians to attend speaker programs, dinner programs, weekend conventions.

Q Anything else that you can recall?

A Commit to prescribing medications that we had discussed.

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[144] Q. And my question may not have been clear. I asked you -- well, how often did you have interaction with Mr. Nash?

A Daily or every other day.

Q And what kind of interaction would you have with Mr. Nash daily?

A Daily, it was voicemail or actually talking to him on the mobile phone or -- or emails.

Q And what types of things did you talk with him about daily?

A Business.

Q What kind of aspects of business?

A "Where are you? Where are you going? What are your messages? Are you guys meeting as a team? How's your routing? Is there anything i can help you with? Resources you have? Resources you don't have?"

[148] Q Okay. Under -- if you go to line 41 on page 2, the second sentence, Shane -- oh --

> "He is learning more about what will drive [the] business and how to utilize his data to really get a handle on which customers to target and maximize."

Did you have an understanding of what that term "driving the business" meant?

A No.

Q You've never heard that term other than in this document?

A I've heard the term but I --

Q Let -- let me ask you a general question.

When you've heard that -- when you heard that term within GSK, what was your understanding of the term, quote, "drive the business," close quotes?

A Seeing the right physicians the right amount of times based on the frequencies, delivering the core key messages that we were trained on on these particular products that we're assigned to promote to these key physicians.

Q And was part of that getting a commitment [149] from the physician to write the prescriptions in terms of driving the business? Was that part of how you were driving the business?

A I wouldn't just say that part of driving a business is to get a commitment. I would say that it would be to build a relationship and to be valued as a resource in bringing information to the physician to make him aware of all of the information as far as safety, efficacy, tolerability for the products, and to --

Q Okay.

A -- to drive business.

Q By getting prescriptions. By getting the physician to write prescriptions for the appropriate patients of GSK products; correct?

MR. PRUITT: Objection. Form.

THE WITNESS: I would ask for business or commitments for multiple different things.

BY MS. JOHNSON:

Q Including writing prescriptions for the appropriate patient; correct?

A Writing prescriptions for the appropriate patient type; correct.

***

[153] Q You talked about reviewing data in connection with your visits to physicians--to physicians' offices. Did you ever ask the physicians questions during your calls?

A We were allowed to ask specific questions about core messages that we were to -- to deliver or information that we were able to kind of engage a physician.

Q Why did you ask questions?

A That was part of my job.

Q But for what reason? I understand it was part of your job, but what information were you trying to elicit from physicians in asking them questions?

A To get a dialogue going instead of just me coming in and talking.

Q And why did you want to get a dialogue going?

A That's the way that the training took place, initial training, ongoing training, that we participated in. I can't recall what the actual class was called, but there would be scripted -- scripted verses that we would -- we would go through and scenarios that we would go through in training, as well as they - GSK invited physicians in that we would interact with and kind of go through the dialogue that we were trained on and kind of any objection that the physician would approach us with. There was scripted dialogue that we would give response to and pull out information and resources to kind of help with that.

Q You -- you were pulling out information and resources to overcome the objections; correct?

A Correct.

Q And the objections would be to things like prescribing a GSK product; right?

A Not necessarily prescribing a GSK product. I -- I mean, I -- I - there were so many different conversations and -- and interactions with physicians. I can't -- I can't give you all of them.

Q I'm not asking you for all of them. I'm asking you for some of them. So let's -- let's just start again. In addressing physicians' objections, were the objections generally to the physician wanting to prescribe the GSK product about which you were talking with the physician?

A Sometimes yes; sometimes no.

Q For those "sometimes yes" instances, how would you go about overcoming the objections to prescribing a GSK product?

A Again, there were scripted-type responses. If the physicians said, "Well, I don't prescribe it because it's not on Blue Cross, Blue," for whatever reason --

Q Uh~huh.

A--if I had the resource that showed that a particular product was or was not on that formulary, I would have shown him that information.

Q Can you give some other examples of objections.

A There's not one in particular that kind of just--

Q Uh~huh.

A--pops out. Yeah, I guess--"Is it safe?" then you would pull out safety information --

Q Right.

A--as far as--

Q And I'm sorry. We got on this whole line of questions because I asked you what kind of questions you asked the doctor, not what kind of questions the doctor asked you. What kind of questions would you ask physicians?

A What kind of question (verbatim) would I ask physicians? .

Q Yes.

A There's a myriad of questions that we were kind of approved to ask. When do they use a product? How do they use a product? And why do they use a product? That would part of the "when/why/how" scenario.

Q Right. And did you always ask every prescriber the same questions every time?

A Not every time.

Q How would you decide what questions to ask?

A It was based on kind of looking at the data that mean, obviously, if I come in and asked you your name every time I saw you, you'd probably get annoyed; and so that type of questioning to a physician, if I asked him when does he prescribe a medication, at some point, he would be, like, "Okay. We already covered this." So then I would--through directives of marketing and promoting materials and--and that sort of thing, I would present information on a particular clinical that was able to -- we were able to--to share with the physician or the sales aid, different pages in the sales aid that - that we could use to formulate a question of, you know, "Are you familar with how a particular product works or the efficacy of a particular product?"

Q And those questions would be--you would tailor those questions based on where you were with that prescriber in terms of your relationship and getting to a commitment; right?

A Based on the direction and interactions with my teammates and my manager, if -- you know, for instance, when I very first started -- I can't just, you know, go in and--and just act like I've been calling on this physician for--for years. It is kind of a "Hey, how are you doing?"

learn office policies, procedures, interact with the physician, try to find out just information about him and his practice, and try to correlate that with the information that was in the computer to make sure that it was kind of up to date. And then based on that, I would ask where, when, and how -- or when, why, and how they would use GSK products.

Q Why would you ask those questions?

A That's what we're in the position to do is find out information from a physician and to promote and market GSK products.

Q I'm sorry. I think I asked you why would you ask that--why would you ask those questions, and you said you were in the position to find out information, but what would you do with that information?

A Use it and correlate it to the information that GSK has provided.

Q For what purpose?

A To market and promote GSK products.

Q In order to increase either market volume or market share ultimately; correct?

A Correct. To promote and market GSK 18 products.

***

[161]

Q Do you recall going to any training on what was referred to as the "Worldwide Sales Force Excellent - Excellence Program"?

A I think that was in conjunction with a training, yes.

Q And do you recall whether that training was 20 at the distinct, regional, or national level?

A It might have been national. 1--I can't recall what—

Q Well, if it was --

A--what level.

Q Did you go to a national meeting where you recall the worldwide sales force excellence being discussed?

A It was discussed, I believe, at the Avandaryl launch, but I can't recall if it was -- if it was rolled out prior to that or--or when it was implemented.

Q Okay. All right.

* * *

[166] Q If you turn to page 2 of Exhibit 25, under "Areas of Strength":

> "Shane did a thorough review of each
> customer's prescribing history and

> **the target flag associated with the customer. During [the] call on the office of Drs. Rink and Sink Shane remembered that they were Boniva IV targets. He asked appropriate questions, provided the appropriate information, and asked [167] for the business. He pursued his objective."**

Was that identified as an area of strength for you with respect to your precall planning?

A Yeah. I did exactly as I planned. I --

Q And how --

A -- asked appropriate, approved questions; provided the appropriate, approved information; and I asked for a commitment.

Q Okay. And when you say "asked for a commitment," you're referring to the section of that box that says "and asked for the business"?

And, if you're not, how did you go about asking for the business?

A I don't recall exactly what the specific question was.

Q Can -- can you recall any ways in which you went about asking for the business apart from this form?

A "Would you come to a dinner program with an approved speaker? Would you read a clinical reprint and give me your thoughts on the validity of -- of what you think of it? Will you prescribe medications?"

***

[173]

Q Approximately how many prescribers did you call on a day?

A On average, it was between eight and ten.

Q Okay. And you were required to be in the field from 8:30 to 5:00; right?

A Yes.

Q When you called on each of those eight to ten prescribers, is it accurate that you modified your approach somewhat based on the previous call you'd had?

A Can you give a definition of "modified."

Q Sure. In other words, if you had established a certain level of commitment for Physician A during the last call, you would try to get a different level of commitment from Physician A on the next call; correct?

A Based on kind of a-

Q I'm not referring to the document now. I'm just talking generally.

A No. I'm just -- based on information that I had with physicians and data that was provided, if--if--because they were all approved messages that—that myself and others were using, we could use--based on--on the history, we would use a

* * *

[184] Q I understand. I'm asking--let me ask the question. When you worked in Kentucky, did you have any office other than your home office?

A No.

Q When you worked in--for GSK in Arizona, did you have any office other than your home office?

A No.

Q One of the things that you seek in connection with this lawsuit is payment for your overtime wages; correct? Payment of overtime wages; right?

A Correct.

Q About how many hours per week would you say you worked in your home office outside of the territory? Being in the territory?

A Outside of being in the territory from 8:30 to 5:00.

In addition to those hours, it would range [185] anywhere between 10 to 15 to 20 hours, depending on -- I'm just --

Q I'm sorry. I'm -- I'm not disputing the number; but I don't think you understood -- I don't think the question was clear.

A Are you asking how many hours I worked outside of the normal business hours?

Q Your home office. In your home office. Not -- not other things you were doing but just in your home office, is my question --

MR. PRUITT: Go ahead and answer it.

BY MS. JOHNSON:

Q Is the question not clear?

MR. PRUITT: If you understand it.

THE WITNESS: 10 to 15 hours.

BY MS. JOHNSON:

Q And I don't want you to include speaker time. I don't want you to include meetings with prescribers outside of office. I want you only to include the time that you were spending in your home office; is that right?

A Correct.

Q So 10 to 15 hours.

***

[204] Q Then between April 4th, 2005, and May 30th, 2005 -- I'm sorry -- let me go back. Yeah. Between April 4th, 2005, and May 30th, 2005, you earned $46,021 in terms of your base salary; right?

A Correct.

Q And between May 30th, 2005, and May 29th, 2006, you earned $47,410 in base salary?

A That was up until April 3rd of 2006. And then it changed to 48,710 on May 29 of '06.

Q Okay. And then between September 4th, 2006, and the time of your termination from GSK, you were earning an annual salary of $51,840; right?

A Correct

Q If you go back to your offer letter—I think it's Exhibit 3.

A Yes.

Q In Exhibit 3, you were told that your annual target for sales incentive compensation was $21,000; correct?

A Correct.

Q And your incentive comp was paid on a quarterly basis; right?

A Correct.

***

[210] Q And so your target for incentive compensation was $21,000 a year. Is it true that it was possible for you to earn more than $21,000 a year in incentive compensation?

A To my knowledge and based on the results from Exhibit 30, yes.

Q I'm sorry. I wasn't looking at Exhibit 30. I'm --I'm asking you generally. Was it your understanding--

A Yes.

Q Was it your understanding that you could earn more than $21,000 a year in incentive comp?

A Yes.

* * *

[226] Q Okay. All righty. Let me ask you some questions about your typical visit to a healthcare provider's office.

During your visits to a healthcare provider's office, you generally discuss GSK products; correct?

A Yes.

Q You discuss the clinical benefits of GSK products?

A Yes.

[227] Q Did you discuss the dosing benefits of the product?

A Yes.

Q Did you discuss the patient type that the product would be appropriate for?

A Yes.

Q And did you discuss the advantages of the GSK products versus competitor products?

A I don't know if I said "advantages."

There were messages to say why.

Q Let me ask you a different question.

Did you discuss the benefits of the GSK products over competitor products within guidelines?

A I think I just spoke on the benefits of GSK products.

Q Okay. And I think you've testified you responded to questions that were posed to you by the healthcare providers?

A Yes.

Q Is it accurate -- you attempted to build a relationship with the providers?

A That would be correct.

Q And did you attempt to address objections that the providers posed to prescribing more GSK--or to prescribing GSK products?

[228] A Based on--on responses we were allowed to say, yes.

Q Is there any aspect of a sales call that--was there any aspect of a call on a prescriber that you felt made one call more successful than another?

A Not one that just really pops out.

APPENDIX C — DEPOSITION OF FRANK T. BUCHANAN IN THE UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA, DATED APRIL 23, 2009

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. cv-01498-FJM

Michael Shane Christopher, filing individually and on behalf of others similarly situated; and Frank Buchanan, filing individually and on behalf of all others similarly situated;

Plaintiffs,

versus

SmithKline Beecham Corporation,
d/b/a GlaxoSmithKline;

Defendant.

DEPOSITION OF: *FRANK T. BUCHANAN*

TAKEN ON: April 23, 2009

* * *

[42]

Q The job you held immediately prior to joining GSK was with Qwest Communications?

A That is correct.

Q During what period of time did you work with Qwest?

A I got hired – see, it would have been August – August of 2001, approximately, is when I started working there.

And I was employed through May or June of 2003.

Q Okay. And what was your job during that time period?

A Initially, I was hired as a small business sales representative.

I was then promoted to a management position in the sales – business sales arena for the last probably five months I was there.

Q Okay. And what were your duties, generally speaking, as a small business sales rep?

A To sell business products to small—what they would consider to be small businesses; so telephone lines, high-speed Internet, cell phones, things of that nature.

Q Who was your supervisor in that position?

A Initially – for a bulk of it, a gentleman by the name of Gary Bever. Last name is B-e-v-e-r.

Q Okay. And for the rest of it, who was your supervisor?

A It's a gentleman named Patrick – I'm remiss to find his last name. I can't think of it right now.

Q Okay. Did you receive a base salary as a rep for Qwest?

A I did.

Q Did you receive any sort of incentive compensation?

A I did.

Q How much was your base salary when you left Qwest? Do you recall?

A Not offhand, no.

Q How was your incentive compensation determined at Qwest?

A It was a structure in that you had a target pay of – for example, say – we'll say $50,000, and what they would do is they would take 20 percent of that and put it at risk; so that money was at risk. If you mailed – made your sales goal at the end of each month, then you were paid that at-risk portion of your pay.

If you went over goal, it would be your at-risk plus a percentage. It was all based on – on how much money you had at risk.

Q So you say you had target pay of $50,000. Was that supposed to be your total annual –

A Correct.

Q – cash compensation?

A Exactly; right.

Q So that included your base salary?

A Correct.

Like I said, it's a little convoluted, but you were given a salary, and then they took 20 percent of it, roughly, and put it at risk.

So if you made your sales goal, you got that extra – you know, you got that 20 percent; so for the sake of your question, your base pay would be 20 percent less than whatever your target was for that year, your target salary.

Q So if your – if your base salary was $50,000, it was possible annually to earn less than that?

A Absolutely. If you didn't make your sales goal, you would make for less than that.

Q Okay. And –

A 20 percent less.

Q Okay. And you only made more than your base pay if you exceeded your sales goals monthly?

A That is – that is correct.

Q All right. And you get data from Qwest on a monthly basis showing you how you were tracking as to goal?

A No. The way it worked there is all of the selling was over the phone; so I would track all of my orders when I sold anything.

You put an order into the system. You'd bill the customer. There was a lot of criteria about whether or not that sale would count for you, including if the customer paid for it, if it was installed.

So then I would track the orders through the system, and then you would keep a tally of the revenue that you directly earned, you know, for the company over the course of a month.

So it was something that – that – that I tracked; and then, at the end of the month, they gave you a figure that said "This is what we have," and you compare the two.

Pretty much every month, they – they did not match; but you're able to work it out as to why, you know, go back and find orders that didn't complete through the system or something of that nature.

Q Okay. Did you ever receive overtime pay while you were employed by Quest as a sales – small business sales representative?

A I don't remember. I was an hourly employee, and I can't remember if I ever got overtime.

I know they were very, very strict, exceptionally strict, about clock time, in and out for breaks and things like that for the sake of overtime. So I – but I don't remember if I ever moved into overtime pay or not. I don't recall.

Q All right. So you actually – did you – did you literally punch a clock when you got to your office?

A I did, on a computer.

Q Okay. And you don't recall, as you sit here today, whether you actually were ever paid any overtime?

A I don't. If I did, it was - it was rare or be an exception, certainly not the rule.

Q All right. So you never went out to the customer and did outside sales work?

A It was rare. I did a few times, but it was rare.

Q Okay. So very different from what you did, then, at GSK?

A Without a question.

Q Okay. What was your job before you joined Qwest in around August of '01?

A I worked for a startup company, managing a 5 sales team. It was called Shark Collector. It did business-to-business collections. I did that for maybe six months.

Q How do you say? Sharp Collector?

A Shark, S-h-a-r-k, uh-huh.

Q Okay.

A Catchy name.

Q And tell me again what Shark Collector's business is.

A They worked – they are actually a group of attorneys that worked to collect business-to-business debt; so if a contractor did work for somebody and wasn't paid, we'd go after them.

Q Okay. And what was your position with Shark Collector?

A I was a sales rep.

Q And tell me what you did in that role.

A Cold contact. I made between 100 and 150 phone calls a day with businesses, trying to schedule appointments to get in and sell our services to them.

Q Did you ever go out and call on people?

A Every day.

Q You did.

So you made 100 to 150 calls per day; and in the same day, you would actually go out and have appointments in person?

A Correct.

Q How many appointments per day would you say you averaged?

A Two to three.

Q You said you had that job for about six months?

A That is correct.

Q Why did you leave?

A It was 100 percents sales commission job, and it was a startup company; so the – the gentlemen that were running it were exceptional people. I held them in very high regard.

However, it was a new business; it was a new concept. So compensation policies were changing. They were trying to make them equitable.

And, to be honest with you, I don't think they were real sure about how to – how to go – I think it was a great idea; but I don't think they knew how to go about executing it, and when I reached the point where I wasn't making very much money, I had to leave.

Q What percentage of commission did you get on a sale?

A I don't recall exactly. It was a set amount. It – it wasn't necessarily a percentage. It was a set dollar amount. If you – for every case, I think it was $100, if I remember right.

Q And it sounds like you did not receive any sort of overtime compensation in that setting.

A It was 100 percent commission.

***

[110] the respiratory product portfolio to allergists, pulmonologists, pediatricians, family medical practitioners?

A According to GlaxoSmithKline.

* * *

My question to you is weren't you, Frank Buchanan --

A Uh-huh.

Q -- as a GlaxoSmithKline pharmaceutical sales representative, responsible for selling respiratory drug products to allergists, pulmonologists, pediatricians, and family medical physicians?

A Not in my opinion.

MS. CROCKETT: Objection. Form.

THE WITNESS: Not in my opinion, no.

BY MS. SHAD:

Q And was there any reason why you would tell Schering-Plough that that's what you did if that's [111] not what you thought you were doing?

A Absolutely.

Q Tell me why.

A It's standard verbiage for the industry.

Q Hmm. Okay. You've lost me. Explain to me what you mean.

A What they consider to be sales in pharmaceutical circles is -- is what -- is what I said I did. I mean, what they would consider to be sales or what pharmaceutical companies would call "sales" is pretty consistent among all companies.

What I consider to be sales wasn't that.

Q But you certainly represented that what you had been doing was selling; correct?

A That is correct.

Q All right. Did you also make that same representation to the medical device companies that you applied for?

A It's funny you bring that up. I did.

Q Okay.

A And that's why I was summarily not interviewed any further.

I found that medical device companies almost as a rule will not interview pharmaceutical reps because they feel we don't do sales.

[112] Q Now, what in the world do you base that on?

A My own experience of being told that over the phone by countless recruiters and companies that I talk to trying to get a job at medical devices.

Q Okay. Who -- who told you that and when?

A Well, I -- certainly Ethicon and MiniMed both made that very clear to me when I contacted them. That would have been in December of '06 or -- no. I'm sorry. December of '07 or January of '08, when I was looking for jobs.

Q And in what conversation with those two companies was that made clear to you?

A When I -- I had contact information for sales managers within those organizations. When I contacted them to talk to them on the phone said, "Look, I did the phone screen. You know, I haven't heard anything back, you know. What's going on?"

They were pretty honest with me. They said, "We don't hire pharma reps because you guys don't sell."

If you go to that Website I was talking about, probably 80 to 90 percent of medical device postings will say "no pharma reps" on them. That's why.

Q Okay. But you thought you sold?

[113] A I thought what -- I thought what I was hired to do was sell, and when I got out into the field, that's -- that's not what we do.

Q You don't sell for Schering-Plough?

A No. I market for them.

Q Okay. But you certainly have described what you do as selling repeatedly consistently?

A Within the pharmaceutical industry, absolutely.

Q Uh-huh.

A It means something different in the pharma world than, say, the rest.

Q Explain what you mean.

A When you just go into an interview to describe your, quote, "sales experience," typically the person that's interviewing you or when you're explaining that, they expect that there's some type of purchase made, that you're actually -- funds are transferred. There's contracts signed. There is some type of close that's made to -- to consummate the sale and it -- and I came from a true sales environment at Qwest.

And the differences are night and day between a sales environment, where you actually sell somebody something and they buy it and you fill out [114] an order and they're shipped merchandise compared to in the pharmaceutical world that you're trying to put -- you're trying to position your product to the doctor to make it worth them writing on their pad. They don't buy anything from you. They don't purchase anything from you. They don't leave with anything that you had. They simply write it down; and then, if the patient is motivated, they will go to the pharmacist and the pharmacist doesn't talk them into another product, it'll get filled.

But as far as selling anything, that's not really what goes on at all.

***

[121] Q Some of what you sold was volume measured; correct?

MS. CROCKETT: Form.

THE WITNESS: At one point.

BY MS. SHAD:

Q Okay. And in that instance, a physician writing more prescriptions than he or she had in the past directly contributed to the increased volume of GSK's sales of its product; correct?

A For that individual example, yes.

Q All right.

A I think in five years with GlaxoSmithKline and eight to ten products I sold I think one for maybe one quarter or two at the most was based on volume. It was – it was almost always exclusively market share gain.

Q Your objective as a pharmaceutical sales representative for GlaxoSmithKline was to convince prescribers that the benefits of GSK's products warranted them prescribing that product to the appropriate patient; correct?

A That is correct.

Q All right. And your goal was to get physicians to write more prescriptions for the products you had in your portfolio; correct?

A That is correct.

Q Back to Exhibit 2, which is your resume submitted to Schering-Plough, if you go back under the "Results" section, the third bullet down states:

"Successfully drove Wellbutrin XL through the P&T committee process to gain formulary Coverage on NARBHA 2005." Did I read that correctly?

A Yes.

Q Tell me what it means to "drive Wellbutrin XL through the P& T committee process to gain formulary coverage."

A In today's pharmaceutical environment, the greatest driver of whether or not a drug is prescribed or not is its formulary coverage on insurance plans. Wellbutrin XL was a drug that I had for two years. It was exceptionally difficult to sell because formulary coverage was almost nonexistent.

A patient -- if the doctor were to actually prescribe it, the patient would have to pay more than $100 at the pharmacy to get it. There were other drugs that could do the same thing. I came up with a strategy with my boss to get NARBHA to put form- --Wellbutrin XL on its formulary.

It took about 18 months, and it worked. They finally did add it to their formulary, and then I was reassigned to Phoenix, but that's what that's what that's stating.

Q Okay. And you considered that to be a major achievement for you?

A Without a doubt, that is a big achievement.

Q All right. And getting that product through the P& T committee process onto the formulary caused your business to grow; correct?

A I would assume. To be honest with you, after the change was made, I left a short time later and didn't see that data; but I would assume so.

***

[125] Q What did you do as a regional associate trainer?

A I did several things. I would aid in new – new hire training. I would "contuck"—conduct facilitations of – of different phases of training. Sometimes that required traveling.

I would roll out facilitation sessions and product launches, regional meetings.

I'd ride with new-hire candidates in the field and aid them in – in what to expect, going into an office kind of right out of training. People who don't have a lot of experience really at all in sales, pharmaceuticals sales specifically, don't know what to expect.

You know, that was – I had a lot of good experience to do that, coming from a traditional sales world into what they called pharma sales to help them with that.

A lot of the things you're trained to do in new-hire training are not applicable in the field, get you kicked out of offices; so you have to work with trainees to help them acclimate themselves.

Q So, in your view, the – I think you just said a lot of the training you received during the formal training doesn't serve you well in the field. You have to adjust to what the realities out in the field are?

A To some extent.

Specifically, what I mean is they – they train very hard for what they call their close, which is "Doctor, will you prescribe said product for your next ten patients."

Typically, if you do that in a doctor's office, they will throw you out, and you will not be welcome back ever again: so you reach the point where asking for the business *most likely is going to get you thrown out.*

So, you know, that – that was my greatest concern as a trainer that you wouldn't really go and do that because, if you go in – that's what you would do – that's what I would do at Qwest. At the end of a call, I'd ask them, "Are you going to buy the cell phone? Yes or no." If they do, great, let's do an order.

You do that in the pharma world, and doctors typically do not tolerate that.

Q There are other sorts of commitments to gain besides just committing to write a prescription for the next 12 patients; correct?

A There's a lot – there are a lot of commitments that you get, you know, as far as – you know, kind of getting back to the whole marketing sales things; right. You get a lot of commitment for things that don't involve writing prescriptions; that's correct.

Q But a lot of the commitments you ask for are designed to get a physician ultimately to the interest point of writing more prescriptions; correct?

A Hopefully. That's your goal. You hope that.

***

[126] Q So, in your view, the -- I think you just said a lot of the training you received during the formal training doesn't serve you well in the field. You have to adjust to what the realities out in the field are?

A To some extent.

Specifically, what I mean is they -- they train very, very hard for what they call their close, which is "Doctor, will you prescribe said product for your next ten patients."

Typically, if you do that in a doctor's office, they will throw you out, and you will not be welcome back ever again; so you reach the point where asking for the business most likely is going to get you thrown out.

So, you know, that -- that was my greatest concern as a trainer that you wouldn't really go and do that because, if you go in -- that's what you would do -- that's what I would do at Qwest. At the end of a call, I'd ask them, "Are you going to buy the cell phone? Yes or no." If they do, great, let's do an order.

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A Hopefully. That's your goal. You hope that.

***

[154] Q When were you trained as a trainer?

A I'm really not sure.

Q Can you give me a year.

A I would guess 2006. That's a guess.

Q And where did you go to be trained as a trainer?

A I went to Research Triangle Park, North Carolina.

Q How long was the training you went through?

A It was a week.

Q And once you went through that training, what training did you then turn around and provide?

A I did a Phase 2 training in Salt Lake City.

I did several sessions at a regional meeting shortly thereafter.

I did some local trainings for our district.

Q Anything else?

A Not – not that's coming to mind right now.

Q Okay. When you say you did Phase 2 training in Salt Lake City, what – what –Phase 2 of what?

A Phase 2 initial higher training.

***

[160] Q Okay. Which of those products did you sell when you were responsible for the Northern Arizona territory?

A Sold Wellbutrin, Advair, Imitrex, Boniva.

And that's it.

***

[168] Q How did you learn about the opening at GlaxoSmithKline?

A Monster.com.

Q And was it advertised as a pharmaceutical sales rep position?

A I don't remember. I would assume. I don't know.

Q Did you understand that GlaxoSmithKline was looking for people with prior sales experience?

A Yes.

***

[170] Q Okay. Well, are these things, 1 through 14, things that you actually were expected to do once you started work?

A Yes.

Q Is there anything on the list of 14 that you were not expected to do?

A No.

Q All right. Did you think that your prior sales experience at Qwest would help you --

A Yes.

Q – perform satisfactorily as a pharmaceutical sales representative?

A Yes.

***

[179] Q And then how long was the training in Atlanta?

A I believe it was three and a half weeks.

***

[181] Q Okay. You were told that you would be expected to engage in discussion and dialogue with a doctor about why GSK products would be effective for a particular type of patient; correct?

A That is correct.

Q You all in the training use the word "customer," did you not?

A Yeah. Sometimes. Sure.

Q Okay. And customer in that context referred to the physician; correct?

A Sometimes. Sometimes the office staff is called that.

Q Okay.

A Depending on the point of the exercise.

Q The customer within your training was either the actual prescriber or someone in the office who could influence the prescriber; correct?

A Correct.

Q And you were also trained to provide the healthcare provider with medical literature approved by the company?

A Correct.

Q And one of the important things that a pharmaceutical sales representative does is actually engage in discussion and conversation with a prescriber; correct?

A Correct.

Q And would you agree that that was something that you were particularly effective at doing?

A Sure.

Q And I think we've covered this before, but you were also told in your training and actually did in your day-to-day work that you needed to get commitments from physicians as best you could to actually prescribe GSK's products?

A Yeah. They called it "gaining the best possible commitment."

Q Basically asking for the business in a way that you were comfortable doing?

A Asking for whatever you could get, to be honest with you. Sometimes it was getting an agreement they'd see you again. Getting an agreement to use the samples you've left, things of that nature.

***

[183] Q Okay. And what with the goal – the ultimate goal being to get that physician to prescribe the product?

A That's what we're after.

***

[187] Q What was the purpose of the ACES Program?

A It was an opportunity for doctors to give medicine to patients at no cost. And they, in turn, could monitor their progress based on surveys that the patients completed; and then those surveys were sent back to the physicians.

Q All right.

A If I remember right.

Q Okay. And at the bottom of the first page of Exhibit 8, which is where your response to Mr. Schwartz is – do you see that? --

A Yes.

Q – you say:

"Mark, per Joe's request, I am passing on some of the things I have been doing with the Aces Program to generate success."

And then below that, you list a number of things that carry over to the next page.

A Correct.

Q All right. And one of the things that you state that you did with respect to the ACES Program was that you "evaluated prospective physicians by total" -- "by total antidepressant prescriptions and WXL volume."

Is that Wellbutrin XL?

A Yes.

Q All right. And then:

(Reading) Physicians with a high antidepressant prescription count and low Wellbutrin XL counts were the physicians I considered to be better opportunities. In my opinion, these physicians hadn't been sold on Wellbutrin XL as an antidepressant and would be more wiling to try it with the followup offered in the ACES Program.

Did I read that correctly?

A Yes.

Q Okay. So this ACES Program is a way to get physicians to begin prescribing Wellbutrin more; correct?

A Correct.

Q All right. And your approach to the physicians that you called on was an approach that you developed on your own?

A Yeah.

Q Okay. And you had some success with that; correct?

A Yeah. It wasn't difficult to sell free medicine.

Q If you continue to read through the email, it is maybe the third or four point that you make. There is a paragraph that starts:

"I also made a strong point of the fact that I could only choose a limited number of physicians to participate."

Do you see where I am?

A I do.

Q You go on to say:

"I would also make a strong point that I chose their office specifically because of the quality of their operation and my" con- -- "confidence in their ability to target patients."

Did I read that correctly?

A Yes.

Q So that's - that's information that you knew because you knew those physician practices and what their operations were; correct?

A To some extent.

Q Well, that's what you say here anyway; right?

A That was my way that I sold it to them. To be honest with you, if their practice was in shambles, I'd probably say the same thing to them to get their buy-in.

Q Did you go to every practice and try to get them to participate?

A No. I did exactly what I stated as far as I targeted potential – potential success based on volume; so a doctor that only writes, say, one or two antidepressants scripts a month, this will not be somewhere where I'd present that.

Q So you exercised your judgment in deciding which physician practices you would try to get enrolled in the ACES Program?

MS. CROCKETT: Form.

THE WITNESS: I would pick off of our target list, yeah.

BY MS. SHAD:

Q Right.

But -- but you're the one who picked off the target list. Nobody said to you, "Pick these people off this list --

A No.

Q – for this program"?

A No.

MS. SHAD: That will be the next one. What number is it?

THE REPORTER: 9.

(The document referred to was marked as Buchanan Exhibit 9 by the Reporter.)

BY MS. SHAD:

Q Mr. Buchanan, I've handed you what's been marked Exhibit 9 and will represent to you that it is a copy of your training record while at GSK.

Can you just take a look at that, and let me know if you see anything on here that makes you think it's not correct.

A No.

Q As far as you know, sitting here today, you took each of these training sessions as listed on Exhibit 9?

A Yeah. I would –I would assume.

Q Were all of them mandatory or some of them ones you chose to take for your own self-education or for some other reason?

A A vast majority of these would be mandatory.

Sometime at regional meetings, they'd give us a choice. Like, you'd have an elective, if you will, and I'd pick one of those, trying to see if any of these are train the trainer or anything like that.

The – that would be something that I would elect, but it looks like these are all – actually, I forgot about certified VESIcare.

No. These are all required trainings.

Q Okay. You're saying everything on this list is required?

A To my understanding, yes.

Q And you were never trained on products that you never were responsible for; correct?

A No. Ironically, I would train on products that I wasn't trained on, but I never – I never certified for products I didn't sell.

Q You did – are you saying – are you telling me you did product training on products --

A Sometimes.

Q – that you didn't – were not trained on?

A Sometimes.

Q Tell me when that happened.

A There was times at the – at the district level, I'd help out the Avandia guys, you know, with the clinical reprint or something of that extent.

Q All right. You – you were not the person in charge of that training. You were just assisting someone else who actually was a product specialist?

A No. Picture, like, sitting down in Starbucks with five people and going over a clinical reprint, kind of show them how to sell it.

***

[219] Q All right. Now, if you would keep that exhibit in front of you and at the same time go back to Exhibit 14, which is the actual winning practices document, I want to ask you some questions about that.

A Okay.

Q You'll need both – you'll need both documents sort of – yeah. Okay.

All right. Looking at your self-assessment, the first winning practice is "Own the Territory Business"; right?

A Correct.

Q And the first of those subparts under "Own the Territory Business" is "Analyze what is happening in the territory and understand why," and you rated yourself "Expert" on that piece; correct?

A I may not be reading this right.

Q It is a little confusing. I think what happens is the "Prefoundational" should be over here and the document – I can't imagine you rated yourself "Prefoundational" on any of these things.

A I wasn't thinking so, but I sent the email at 12:30 in the morning; so maybe.

Q Well, does it make sense to you we've got four columns here next to the measures?

A Yes. Oh, it does.

Q Okay. So—so you would agree, then, under the first measure under winning practice No.1, you rated yourself "Expert"?

A I would think I did.

Q All right. If you would go back and look at the "winning practices" document, which is Exhibit 14, if you turn to the fourth page of that document, here is where that winning practice No.1,"Own the Territory Business" is explained; correct?

A Uh-huh.

Q Correct?

A Correct.

Q And under the "Expert" box for "Analyze what is happening in the territory and understand why," it states, to be expert on that measure, you:

"Gain competitive advantage by participating opportunities and challenges, interpreting the latest results for others and leading [the] team action to grow the business."

Correct?

A Yeah.

Q And you did that as a pharmaceutical sales representative; correct?

A I seem to think so.

Q It also states:

"Discern the activity of the competition in the local marketplace and what the team needs to do to be effective."

It was your self-assessment that you also did that; correct?

A Yes.

Q All right Back to your self-assessment, which is part of Exhibit No. 15, the second measure under Winning Practice No.1:

"Plan what each team member will do to drive superior sales for each promoted product."

You rated yourself "Proficient" on that measure; correct?

A Correct.

***

[227] Q Sticking with Winning Practice No.4 but going down to the third measure, which is "Organize the sales call to maximize your selling time and results," you rated yourself "Expert" on that; and in the "winning practices" document, Exhibit 14, that description of "Expert" is:

"Prepare so well that you can adjust your selling approach and respond effectively to whatever the customer says during the call."

And you certainly were able to do that?

A Most of the time, yeah.

Q Okay. And that required that you'd be quick on your feet?

A Yes.

Q Flexible in your approach?

A You had to be –you had to be prepared for potential objections.

Remember when I was talking to you before about the verbatims--

Q Yes.

A – for handling – you need to know which one to hit when – when you're hit with a - an objection. In my opinion, that's what it means by being prepared to handle it.

Q So is it accurate to say that you got a tremendous amount of information in your head and you've got to be able to pull out the right information to respond to whatever the objection is you get hit with?

A Right. The more effectively you do that, the better chance you have at keeping the doctor's interest.

Q Okay. Winning Practice No.5 on the self-assessment is "Sell Through Customer-Focused Dialogue"; and again on all three of these submeasures, you rated yourself "Expert"; correct?

A Yes.

***

[233] Q Okay. Back on your self-assessment-assessment document, Winning Practice No. 6 is "Get the Best Possible Commitment on Every Call." You rated yourself "Proficient" on each of those subparts; correct?

A Yes.

Q All right. And looking at the "winning practices" document with respect to Winning Practice No. 6, the boxes there for those three measures under "Proficient," you believe that that's how you performed against that measure; correct? Proficient as described in the "winning practices" document?

A I think this was the biggest weakness that I had as a pharmaceutical rep.

Q Can you be more specific. Biggest weakness as to what?

A This was my -- when I looked at my own development, this was, by far, my greatest weakness.

Q This particular winning practice?

[234] A Getting the commitment because I came -- and still is. I came from an environment of "You can tie them down. You can get a commitment. You could get a signature. You could get a deal done."

And here they can tell you anything they want. They can "Yes" you to death. "I'll write it for every patient." They can do whatever they want after that. There is nothing I can do about that.

So this is where I struggle the most as a pharmaceutical respect.

Q Irrespective of whether they actually follow through, you're still charged with asking for the commitment?

A Oh, without a doubt. The -- one of the doctor types that we trained for is the "yes" doctor, the "yes" man -- "Oh, I write that all the time. It's the greatest drug ever."

You know, "Will you this or that?" Will you prescr-" --

"Yeah, oh, yeah. I'll write it all day. Every patient I see. I'll write it for people that don't even have that disease."

What do you do with that?

***

[254] Q Is it accurate to say that this text in your email response to Miss Gavin is your articulation of an appropriate dialogue to have with a physician?

A It absolutely is.

Q This isn't something that was provided to you by the company. You came up with these messages, within guidelines, on your own?

A Yes and no. You'll find a lot of these in the sales paper or in the sales aid or the clinical reprints. I even footnoted some of them where I said, you know, "Use the Nelson paper."

I can't really strike any of these as my own original ideas, but this is the way I organized thoughts.

She is relatively new to the product, was struggling with the clinical side of it. Danielle got sales results through relationship, not so much the scientific knowledge; so she was somebody that I thought, if she strengthened her clinical side just a little, if she sharpened it a little bit, she could talk competently to the science and probably do much better; so --

Q So– so essentially – and I understand you cannot use information that is not approved information about a drug product.

A Correct

Q But these messages here that you've put together is – is, again, your articulation of approved information, the way that you think it best makes sense to present; correct?

A Correct.

Q And at the end of each of these, there is a commitment question, is there not?

A Yes.

Q In fact, under the "why initiate?" paragraph at the end of the message you have written, "Will you prescribe Advair 100/50 for moderate patients that require initiation of combination therapy?" Correct?

A Correct. They walked through – I walked through the GSK sales model step by step.

Q Okay.

A To be direct, I was probably concerned this was going to end up in front of my boss, and I wanted to make sure all bases were covered.

Q You did the same thing with respect to commitment on the step-up message; correct?

A Correct. That's why each one starts with a statement that grabs thought and moves to transition, et cetera. Yeah. I just walked through the sales model.

MS. SHAD: Okay. I want to take a quick break, organize myself a little bit here.

THE VIDEOGRAPHER: Off the record at 3:40.

(A brief recess was taken.)

THE VIDEOGRAPHER: We are back on the record at 3:50.

BY MS. SHAD:

Q Mr. Buchanan, is it accurate to say that part of what you did as a pharmaceutical sales rep was to study and analyze the data that the company provided you about physicians' prescribing habits to try to determine who you should call on and what kind of success you might have with individual physicians?

A It didn't help so much with who to call on. That was pretty well set out for us.

Q Okay.

A But it definitely would help with – with going in -- kind of like I was talking about before, kind of the call goal.

Q Yes.

A So if the easiest place to increase market share is – is someone who is already writing a product – so if they start to go down in market share, doctors rarely do things at random.

So there is probably a reason. So they have more to do with that than who we called on. We – we didn't have a whole lot of discretion in who we got to see.

Q It had more to do more with the goal of the call?

A Correct. It had more to do with what you did in front of the doctor rather than who – which doctor.

Q Okay. That makes sense.

With respect to – to clinical studies, you had reprints of those studies; correct? That's one of the things that you could take with you. One of the reprints you had available to you?

A Correct.

Q And did those reprints help you anticipate and respond to questions that might come up during he call?

A They – they did.

For me personally, what they did is they gave me credibility so that, if I told a doctor, I would -- I would make a statement, for example, "Advair is more effective at relieving broncho constriction than Flovent alone."

If the doctor were to challenge me on that, I knew which clinical to get out and show – show that doctor "This isn't my idea. This came from a clinical trial. It was well-controlled." Present it in that fashion.

Q Right. Okay. When you were a pharmaceutical sales rep for GSK, you did not have an office at any GSK facility; correct?

A I did not.

Q You had an office in your home?

A I did.

Q And was that your only office?

A Yes.

Q How many hours per day on average would you say you worked from your home office while you were employed by GlaxoSmithKline?

A As an average?

Q Yeah.

A I would say probably 45 minutes to an hour in the morning and anywhere from one to three to four hours at night. It really depended on – on the workload at the time.

* * *

[258] Q How many hours per day on average would you say you worked from your home office while you were employed by GlaxoSmithKline?

A As an average?

Q Yeah.

A I would say probably 45 minutes to an hour in the morning and anywhere from one to three to four hours at night. It really depended on -- on the workload at the time.

If I had to put a number on it, I -- I would say -- trying to think of -- trying to make it [259] a global answer and not put a bunch of conditions.

I -- I would say between 15 and 20 hours I'd spend in a week in my home office.

***

[261] Q How many hours per day did you spend in the field?

A That varied. I usually –typically, my routine, I drop my kids off at school about a quarter to 8:00 and would usually head to the territory then, sometimes to my storage unit, depending on what I had to do at that point.

But I would get into the territory between 8:30 and 9:00 pretty – pretty typically. That would – that would be my standard arrival time into the territory.

And then, really, departure, whatever time I – I finished for the day I when I was done with – with the calls that I needed to get in, both the pharmacy and physician. I would say that would be anywhere from 4:00 to 5:00 usually would be a fair statement to say when I would leave the territory.

Q And you would get home around what time, then, typically?

A I would get home between 5:30 and 6:00 pretty consistently, sometimes later if traffic was bad or an accident. But that was pretty consistent.

***

[269] Q -- your managers didn't tell you that you had to do your home office work at any particular time or on any particular day; correct?

A They did. There was -- there was certain standards that had to be met that they would make explicit, like, calls needed to be entered daily, computer transmitted daily, email answered daily, voicemail checked three times a day.

The one initially that I struggled with as a rep was expense reports every two weeks. You know, those were things that -- they were pretty firm about.

Q Those are things you had to do; but, I mean, you could enter your calls at 6:30 at night, or you could enter your calls at 11:30 at night.

That was within your --

A Correct.

Q You -- you organized your own schedule that way?

A You could fit those things into your-- into your personal life, as I think we all do with career.

Q How often in a week would you actually have any direct communications, live communications, with your manager when it was Mr. Golson?

A With Joe? I would probably talk to him live three or four times a week.

He rode with us a lot. Joe was a lot like me as far as, you know, he was given a directive that he needed to be in the field 90 percent of the time; so I rode with Joe probably every three weeks, you know, four weeks, depending on the travel schedules and things like that.

And, obviously, he wasn't with you all the time, but I would say we talked live on the phone probably two or three times a week. We traded voicemails. We had a voicemail system. That was probably our primary mode of communication. I only called him on his cell phone if I needed something that was urgent, and -- and he would do the same with me.

So, yeah, that wouldn't happen but maybe a couple times per week.

Q Is it accurate to say that, other than on the days that he actually rode along with you, you didn't have direct supervision in what you were doing during the course of your day?

A Not from a human being. There's a lot of electronic surveillance as far as call entry and these kinds of things that, you know, you get a -- get a report. You know, they'd go over calls per day, how many doctors you sampled -- actually got signatures, things of that nature.

But, no, as far as someone literally watching what you do, no, only when they were with you.

Q Right. Right.

During these ride-a longs that you mentioned that your managers, Mr. Golson and Mr. Tymai I guess for a very brief period, would do, they evaluated you and gave coaching to you through the course of that day ride-along?

A Correct.

Q Okay. And at the end of the ride-along, do you recall that there were things called Field Coaching Tools or Field Coaching Reports that were completed?

A Correct.

Q And those documents contained lots of information?

A Correct.

Q And you had an opportunity to comment in each of those Field Coaching Tools or Field Coaching Reports yourself; correct?

A That is correct.

* * * *

APPENDIX D — VIDEOCONFERENCE DEPOSITION OF ANTHONY G. COCOLAS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED APRIL 29, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Case No. CV08-01498-PHX-FJM

MICHAEL SHANE CHRISTOPHER, filing individually and on behalf of all others similarly situated; and FRANK BUCHANAN, filing individually and on behalf of all others similarly situated,

Plaintiffs,

v.

SMITHKLINE BEECHAM CORPORATION,
d/b/a GLAXOSMITHKLINE,

Defendant.VIDEOCONFERENCE DEPOSITION
OF ANTHONY G. COCOLAS

April 29, 2009

11:42 a.m.

* * *

[5] Q. My name is Christine Crockett and I represent the plaintiffs in this case. Would you, please, state your full name for the record.

A. Anthony George Cocolas.

MS. SHAD: Christine, this is Kerry. Before we get started, I just thought I would go on the record and make clear that Mr. Cocolas is being produced by the company as its designee on a limited topic of job duties which is part of topic number 1 in Plaintiff's Second Notice of 30(b) (6) Deposition.

* * *

[46] Q. And what was that expectation in the past?

A. The expectation as I've seen it in different documents was between eight to ten calls per day.

Q. When did that change such that there is currently not that expectation?

A. Well, once again, it may vary between regional and geographical parts of the country. So a district sales manager may have a different expectation around call activity that they be out there. This was a general number that was available. I can tell you January 1 with my district that did not have an expectation of eight to ten calls per day.

Q. What was your expectation as of January 1?

A. My expectation was not to focus on a specific metric and a number of calls. The expectation was they would use their time most effectively to grow sales and do whatever activities they would need to do to be successful with that.

Q. And prior to January 1st of this year, did you have a number of calls per day expectation with the sales reps that you managed?

A. There was an expectation of eight to ten calls per day that had been out there, yes.

* * *

[198] Q. I want to go briefly through some of the reporting duties that representatives have. We've already talked about several of them. I'll go through this list quickly. Pharmaceutical reps are required to report information relating to time during those in field hours 8:30 to 5:00 they spend outside the field; is that correct?

A. Yes.

Q. And they're expected to report information [199] relating to their expenses; correct?

A. Yes.

Q. Also they're expected to report the detail as far as what samples are left with healthcare physicians; correct?

A. Yes.

Q. Are they also required to report on which doctors they visit each day?

A. If they have a sales dialogue and they were to have a conversation, then they would need to report that with the physician. If no sales interaction happened, no samples were left, no, they're not necessarily required to report that.

Q. Sorry. What is it they're not necessarily required to report?

A. If there was no sales call or sales dialogue or samples were not left with that provider, then, no, they're not required to report that they called on an office.

Q. If there was no actual dialogue that occurred?

A. Correct.

Q. Okay. Understood. Is there anything else besides the things I've just listed off that you can think of that pharmaceutical representatives are required to report?

[200] A. Well, we mentioned speaker programs. They're required to document attendees at speaker

programs as well as all the administrative requirements of speaker programs. They're required to report adverse events if presented to them through conversations with customers. Let's see. They're required to report policy or compliance violations if they observe those across all the policies of GSK. So an employee if they see something or they act outside a policy, they're required to report that. There may be others, but that's all I can think of right now.

* * * *

APPENDIX E — JOB DESCRIPTION, PHARMACEUTICAL SALES REPRESENTATIVE

JOB DESCRIPTION

JOB TITLE: PHARMACEUTICAL SALES REPRESENTATIVE

REPORTS TO: District Sales Manager

INCLUDES:
SO 6, SO 7, SO 8, SO 9 & S 10

JOB SUMMARY:
Responsible for sales of assigned products in assigned territory.

JOB FUNCTIONS:

1. Be in territory selling from 8:30 am to 5:00 pm

2. Deliver face to face selling presentations to as many physicians as time allows. Minimum expectations are 8 - 10 calls per day.

3. Schedule and complete numerous promotional programs throughout the year (minimum 8 - 12). Occasionally, weekend and evening activity is required.

4. Makes calls to area pharmacies. Minimum expectations are 2-3 calls per day. Must be a face to face interaction.

5. Ensure pharmaceutical products are stocked throughout the selling territory. Receive and maintain a professional sample inventory.

6. Deliver a minimum of one Value of Medicines sales presentation during the year.

7. Attend regional and national sales meetings as appropriate. There are at least two regional meetings per year and they are generally held out of town.

8. Deliver samples to prescribers.

9. Travel, as required.

10.

OTHER JOB TASKS:

1. Record sales calls and activities on the computer throughout the day.

2. Submit expense reports and other required paperwork each day.

3.

ENVIRONMENTAL CONDITIONS:
Inside X Outside X Temp. Range X

FUMES/DUST/GASES:
Minimum X Moderate ☐ Severe ☐

Appendix E

NOISE LEVEL:
Minimum X Moderate ☐ Severe ☐

Additional Employment Facts:
Employee is required to drive company vehicle to and from appointments.

Employee is in and out of vehicle numerous times throughout the day. The temperatures are variable in accordance with local climate.

This job falls in one of the following job categories:

__ SEDENTARY (lifting 10 lbs max and occasionally lift and carry items, mostly 5-6 hours sitting)

X LIGHT WORK (lifting 20 lbs max and frequently lift and carry up to 10 lbs, mostly 0-3 hrs sitting)

__ MEDIUM WORK (lifting 50 lbs max and frequently lift and carry up to 25 lbs)

__ HEAVY WORK (lifting 100 lbs max and frequently lift and carry up to 50 lbs)

__ VERY HEAVY WORK (lifting 100+ lbs and frequently lift and carry 50+ lbs

JOB ANALYSIS (continued)

NAME:

All categories of activity are based on an 8 hour work day, the employee is required to:

Appendix E

ACTIVITY	0-3 HOURS	3-5 HOURS	5-8 HOURS	NEVER	X PER HOUR, DAY OR WEEK	CONDITIONS/ COMMENTS
Lift 0-10 lbs	X					
Lift 11-20 lbs	X					
Lift 21-50 lbs				X		
Lift 51-100 lbs				X		
Carry 0-10 lbs	X					
Carry 11-20 lbs	X					
Carry 21-50 lbs				X		
Carry 51-100 lbs				X		

Appendix E

Stand	X					
Walk	X					
Sit		X				
Push	X					
Pull	X					
Climb						Occasional stairs
Bend	X					
Kneel	X					
Squat	X					
Twist	X					
Crawl				X		
Reach	X					
Grasp	X				----	

Appendix E

Fine Motor Skills-R	X					Computer input
Fine Motor Skills-L	X					

Observed and completed by __________ Date __________

APPENDIX F — DECLARATION OF WILLIAM D. CURTIN IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED MAY 22, 2009

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Attorneys for Defendant SmithKline
Beecham Corporation, d/b/a GlaxoSmithKline

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV08-01498-PHX-FJM

Michael Shane Christopher, filing individually and on be of all others similarly situated; and Frank Buchanan, filing individually and on behalf of all others similarly situated;

Plaintiffs,

vs.

SmithKline Beecham Corporation,
d/b/a GlaxoSmithKline,

Defendant.

DECLARATION OF WILLIAM D. CURTIN

I, WILLIAM D. CURTIN, hereby declare as follows:

1. I currently am employed by SmithKline Beecham Corporation d/b/a GlaxoSmithKline as Director of Specialty Professional Development, and I have held this position since March 2009. I currently am responsible for directing selling skills training efforts in the specialty divisions.

2. Between June 2003 and March 2009, I held the positions of Director of Sales Training, Director of Sales Skills Development, and Director of Sales Force Effectiveness. I have worked in positions involving training provided to sales representatives, including positions involving the design of sales representative training programs, since January 1998 (though I served

as a District Manager from October 1999 to November 2001), and I have been employed by GlaxoSmithKline or one of its predecessor companies since December 1991.

3. I have personal knowledge of the facts set forth in this Declaration, and, if called and sworn as a witness, I could and would testify as to their accuracy.

4. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

5. I am familiar with the types of training materials and programs utilized by GlaxoSmithKline to train its sales representatives.

6. Sales representatives directly interact with physicians and healthcare providers on a regular basis; accordingly, they play a critically important role in both driving the demand for GlaxoSmithKline products and maintaining GlaxoSmithKline's positive relationship with the medical community. As a result, GlaxoSmithKline devotes substantial resources to the training of its sales representatives.

7. All GlaxoSmithKline sales representatives, including both Michael Shane Christopher ("Christopher") and Frank Buchanan ("Buchanan"), receive extensive specialized sales training when they are hired. This training takes approximately eight to ten weeks to complete.

8. All sales representatives, including Christopher and Buchanan, continue to receive specialized sales training, including training through eForce training modules, throughout the course of their employment by GlaxoSmithKline.

9. Sales training is designed to provide sales representatives with specialized knowledge, guidance, techniques, and tools to help them achieve their sales objectives, including obtaining commitments from physicians to prescribe GlaxoSmithKline products for appropriate patients.

10. Sales representatives are trained, among other things, on how to: (i) analyze data regarding the prescribing habits of the physicians on whom they call, (ii) plan and prepare to make an effective sales call, (iii) analyze clinical studies concerning their products so that they can anticipate and respond appropriately to customer questions, (iv) engage their customers in meaningful discussions about the products they are selling (v) gain their customers' interest through engaging communications, (vi) appropriately respond to objections physicians might have to using GlaxoSmithKline products for patients by using questioning techniques and active listening skills, (vii) convey sales messages in a manner that will be most effective on a particular sales call, (viii) determine what level of commitment should be sought on a particular sales call, and (ix) close the sale by obtaining the desired commitment (e.g., a commitment to prescribe GlaxoSmithKline products for appropriate patients).

11. From time to time, GlaxoSmithKline implements specific sales and sales training initiatives.

12. Between 2001 and 2004, all GlaxoSmithKline sales representatives, including Christopher and Buchanan, received training on the Assertive Selling Always Professional "ASAP") Selling Model. Under the ASAP Selling Model, sales representatives received specialized sales training that was broken into eight steps: (i) pre-call planning, (ii) total office call selling, (iii) delivering an effective opening, (iv) identifying/creating needs, (v) the value of positioning, (vi) handling resistance, (vii) closing the sales call, and (viii) analyzing the sales call. Among other things, sales representatives were trained to gain commitments from their customers to take specific action, including, ultimately, to prescribe GlaxoSmithKline products to appropriate patients, by asking questions that seek commitments to action. An accurate copy of the Leader's Guide for the ASAP Selling Skills training that was provided to new GlaxoSmithKline sales representatives, which describes this specialized sales training that was provided to sales representatives, is attached hereto as Exhibit A.

13. Since 2004, all sales representatives, including Christopher and Buchanan, have received extensive training on the When? Why? How? ("WWH") approach to sales strategy and techniques (the "GSK Sales Call Model"). The GSK Sales Call Model was implemented as a part of GlaxoSmithKline's Worldwide Sales Force Excellence ("WSFE") sales initiative and distills the philosophy, key tactics, and research of the

WSFE initiative into three simple questions that seek to connect the prescriber to the GlaxoSmithKline brand: (i) When should I use this product? (ii) Why should I use this product? and (iii) How should I use this product?

14. Under the GSK Sales Call Model, sales representatives are trained to focus on the customer and to ensure that, by the end of each sales call, answers to all WWH questions have been answered. They also are trained on other sales strategies, including: (i) the Total Practice Call, which teaches that selling time should be optimized by presenting the GlaxoSmithKline brand, services, ideas, goals, and vision to anyone who impacts the ability to prescribe GlaxoSmithKline products, (ii) the Brand Bonding Ladder, which teaches that physicians who rarely prescribe products in the GlaxoSmithKline brand must be approached in a different manner from physicians who regularly prescribe products in the GlaxoSmithKline brand, and (iii) Brand Selling with Passion, which teaches that consistently communicating the essence of the brand and linking that brand essence to customer needs increases sales success. An accurate copy of the WWH launch magazine, which describes the WWH approach to sales strategy and techniques, the Total Practice Call, the Brand Bonding Ladder, and Brand Selling with Passion, is attached hereto as Exhibit B.

15. Since at least 2001, all sales representatives, including Christopher and Buchanan, have received extensive sales training on GlaxoSmithKline's "Winning Practices," which are a set of competencies, skills, and behaviors designed to achieve sales success and against

which sales representatives' performance is measured and evaluated. GlaxoSmithKline's Field Coaching Tool focuses on "the behaviors and skills identified through research as being critical in achieving the most effective sales calls" and guides coaching and training "toward the use of the WSFE GSK Sales Model, tactics of high impact sales calls, targeted Winning Practices, and ongoing development." An accurate copy of the Field Coaching Tool Kit, which is "a coaching and development resource designed to capture and provide feedback on proven high impact sales tactics and targeted Winning Practices," is attached hereto as Exhibit C.

16. Through 2006, there were nine Winning Practices, and sales representatives, including Christopher and Buchanan, were taught that superior performers engage in the following activities:

(a) *Implement Their Own Plan to Grow the Territory.* Sales representatives were taught that superior performers, among other things: (i) effectively use technology to track progress, accurately interpret any variance from objectives, and adjust plans accordingly, (ii) develop and implement innovative approaches to solve problems and overcome barriers to success, (iii) gain competitive advantage by quickly recognizing and acting on important local trends, challenges, and opportunities to grow the business, and (iv) mobilize and coordinate team members to maximize local business opportunities.

(b) *Gain Insights into Key Customers.* Sales representatives were taught that superior performers, *among other things: (i) use each customer's hot buttons* to gain greater access, sales impact, and customer satisfaction and (ii) have a complete grasp of the latest prescribing trends *of every key customer*' and use *this* insight to improve targeting efforts and selling approach.

(c) *Build Strong Business Relationships with Customers.* Sales representatives were taught that superior performers, among other things: (i) create opportunities to spend extended time developing strong personal relationships with key customers and thought leaders, (ii) use distinctive methods and persistence to get exposure and access to high-potential customers, (iii) implement specific plans that develop thought leaders into GlaxoSmithKline product champions, (iv) position GlaxoSmithKline as the "go to" company to help solve business and clinical practice problems, and (v) leverage strong relationships to produce loyalty and above average market share growth.

(d) *Master Disease Area and Product Knowledge.* Sales representatives were taught that superior performers, among other things: (i) understand and can spontaneously discuss the results and implications of significant clinical studies, the latest relevant clinical research, and emerging trends in the therapeutic area and (ii) identify potential weaknesses in proof sources, anticipate questions, and prepare answers.

(e) *Prepare for Each Call.* Sales representatives were taught that superior performers, among other things: (i) "think like the customer" to accurately anticipate customer needs, competitive challenges, and customer objections, (ii) prepare effective responses and obtains proof sources, and (iii) develop innovative approaches to create extra interest or impact during the call.

(f) *Engage Each Customer in a Dialogue About Products.* Sales representatives were taught that superior performers, among other things: (i) adjust the timing and approach of the sales call based on an accurate read of the office climate, customer receptivity, and situational opportunity, (ii) leverage the influence of thought leaders and gatekeepers to build sales momentum, (iii) engage the physician in deeper level conversation about products, research, expert opinion, and prescribing practices, and (iv) make effective group presentations, while anticipating and adjusting to the needs of the audience.

(g) *Gain the Best Possible Commitment on Every Call.* Sales representatives were taught that superior performers, among other things: (i) recognize which commitment is most important for the business, (ii) ask for the business, creatively and professionally, to gain the maximum commitment on every call, and (iii) always leave the office with a tangible "next step" commitment that increases the importance of the next call.

(h) *Continually Add Value to the Customer.* Sales representatives were taught that superior performers, among other things: (i) uncover and seize novel opportunities to benefit the physician; staff, patients, or business operation, (ii) develop a strong network and use this to link key customers with the resources, people, or opportunities that could benefit them, (iii) utilize working knowledge of significant off-label studies, (iv) use knowledge of key customers' business and marketplace trends to help them "think into the future" and adapt or improve their business, and (v) become a visible and contributing member of the medical community.

(i) *Demonstrate Initiative, Passion and Persistence to Get Results.* Sales representatives were taught that superior performers, among other things: (i) demonstrate relentless energy and persistence in pursuing goals, exceeding customer expectations, and overcoming obstacles, (ii) accept full responsibility for the success of the territory, (iii) readily offer help, suggestions, and coaching to other sales representatives, and (iv) implement plans that will ensure long-term success.

17. Since the end of 2006, GlaxoSmithKline has condensed the nine Winning Practices to seven Winning Practices, though they remain substantially the same: (i) Own the Territory Business, (ii) Work as a Team to Drive Results, (iii) Master Professional Knowledge, (iv) Plan Every Call, (v) Sell Through Customer-Focused Dialogue, (vi) Get the Best Possible Commitment on Every Call, and (vii) Provide Added Value to the Customer Relationship. Sales representatives continue to be taught that they should follow these Winning Practices against which they are evaluated. An accurate copy of the Winning Practices Self Development Guide, which describes the seven Winning Practices and specialized sales techniques and strategies provided to GlaxoSmithKline sales representatives, is attached hereto as Exhibit D.

18. As a part of their training, sales representatives memorize answers to certain questions about the products for which they are responsible to ensure that they are familiar with those products and can effectively respond to customers' questions. They also learn "core" messages for use when selling particular products. Sales representatives, however, are not trained simply to recite these answers or core messages or otherwise to recite prepared "scripts" during their sales calls. Instead, they are trained on how to incorporate this information into individually-tailored sales calls. A sales representative who depends on reciting prepared answers, messages or scripts, rather than asking open-ended questions, discovering physicians' needs and reservations, responding to physicians' concerns directly, and tailoring his sales technique to the individual customer, is failing to perform his job in accordance with the training that he was provided.

I have read this Declaration, and I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED this 22nd day of May, 2009

s/________________
William Curtin

APPENDIX G — DECLARATION OF MICHAEL SHANE CHRISTOPHER IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED JULY 30, 2009

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Michael Shane Christopher, filing individually and on behalf of all others similarly situated; and Frank Buchanan, filing individually and on behalf of all others similarly situated;

Plaintiffs

vs.

SmithKline Beecham Corporation, d/b/a GlaxoSmithKline;

Defendant.

Case No. CV08-01498-PHX-FJM

Appendix G

DECLARATION OF MICHAEL SHANE CHRISTOPHER IN SUPPORT OF PLAINTIFFS CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Michael Shane Christopher, declare and state the following:

1. I am over eighteen years of age, and I make this declaration based on my personal knowledge related to the facts and issues involved in this case.

2. I am a named Plaintiff in the above captioned case. I joined this collective action as an individual and on behalf of all other similarly situated current and former GSK employees.

3. I am currently a resident of Mesa, Arizona.

4. Unless otherwise stated, my personal knowledge of the matters and issues addressed and discussed in this declaration are based on multiple factors including: my own personal observations and experiences while working for SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK"); conversations with other GSK pharmaceutical representatives both in my own work areas and at national and regional GSK meetings, conventions and training sessions; feedback and information presented by GSK and GSK management at national and regional GSK meetings, conventions and training sessions; feedback and conversation with my supervisor, with

members of GSK management and with individuals in GSK human resources; and GSK policies, guidelines and procedures applicable to all GSK pharmaceutical representatives. For the purposes of this declaration the term "pharmaceutical representative" refers to any and all current or former GSK employee working as Sales Representative/Pharmaceutical Sales Representative, Senior Sales Representative/Pharmaceutical Senior Sales Representative or Executive Sales Representative/ Pharmaceutical Executive Sales Representative in the United States.

5. GSK is in the business of developing and selling prescription medicines and drugs and over-the-counter consumer healthcare products.

6. I was employed by GSK from approximately March, 2003 through May, 2007. While employed by GSK, I first held the position of Pharmaceutical Sales Representative, and in April of 2005, I was promoted to the position of Pharmaceutical Senior Sales Representative. When my job title changed, my duties, responsibilities and methods of supervision remained consistent and essentially the same.

7. While employed at GSK I did not work in any of the following positions: tax, finance, accounting, auditing, quality control, advertising, marketing, research, safety and health, personnel management, human resources, or labor relations. My duties were limited to those of a Pharmaceutical Sales Representative or Pharmaceutical Senior Sales Representative.

8. I did not act as an advisor to the marketing or product development departments, or any other GSK department.

9. While at GSK I did not supervise any employee, manage any department, or run GSK's business.

10. While employed by GSK, I was first assigned to visit physicians in and around Lexington, Mt. Sterling, Morehead, Berea, Richmond and Irvine, Kentucky. While employed by GSK in Kentucky, I operated out of a home office in Lexington, Kentucky. In approximately April of 2006, I transferred to Arizona and was assigned to visit physicians in and around Scottsdale, Sedona, Flagstaff, Cottonwood and Page, Arizona. While employed by GSK in Arizona, I operated out of a home office in Gilbert, Arizona.

11. "Detailing" is a word I have heard and used to describe my primary duties and activities as a pharmaceutical representative and the primary duties and activities of other pharmaceutical representatives (hereinafter "PSRs"). I have also used the terms "marketing" and/or "promoting" to describe the primary duties and activities of a pharmaceutical representative. Detailing is more commonly used and understood within this field and more accurately describes the primary function of pharmaceutical representatives.

12. My core responsibility was to educate and influence physicians.

13. The majority of calls upon physicians were similar in nature.

14. Most calls on physicians did not end with a commitment to prescribe a GSK product.

15. Detailing does NOT in any way include any of the following: a sale of pharmaceutical products, an exchange of any kind for pharmaceutical products, a contract to sell pharmaceutical products, a consignment for sale of pharmaceutical products, a shipment for sale of pharmaceutical products, or any other transfer of possession, title, or other disposition of pharmaceutical products other than samples according to GSK policy and procedure.

16. I never sold any GSK pharmaceutical products.

17. It was my experience at GSK that increased work did not always equal increased compensation. Other variables besides work effort affected compensation.

18. It was impossible to know whether I individually influenced the prescribing habits of physicians when there were a myriad of other factors, including other PSRs who called upon the same physicians. GSK utilized other marketing methods such as TV ads or print media. Some physicians independently researched GSK products. Pharmacists could also influence the dispensing of medication.

19. It is not possible to link the sale of a GSK product to a patient who fills the prescription at a pharmacy to what I did in a meeting with a physician.

20. There were physicians on my target list who refused to see me or other PSRs. Yet, some of those physicians still prescribed GSK products. To the extent the prescriptions written by these physicians influenced market share, I was not responsible for it.

21. Less than one-half of my compensation at GSK was incentive compensation.

22. GSK directed which products to discuss with each physician by a quarterly Plan of Action. The plan indicated the incentive compensation weight given the products I was responsible for.

23. GSK provided reports regarding reach and frequency which listed my assigned physicians and stated how often each physician should be visited in a quarter. This established GSK's expectations of how often I or my team was expected to have face-to-face meetings with the listed physicians during a quarter which was anywhere from 1 to 10 times.

24. I exercised little if any discretion in preparing business plans.

25. To create my business plan I followed a template provided by GSK that included pre-printed columns and topics to assist in completing the business plan. GSK

provided training, reports, and information used to create the business plan.

26. By applying the training and skills taught by GSK, together with the information provided in reports by GSK, I was able to read the reports, interpret the data, and populate fields in the business plan template provided by GSK.

27. GSK directed me who to visit. For example, I received a directive to focus on the top 250 physicians in my assigned territory for the assigned disease states. GSK provided reports listing the top 250 physicians and included their names, addresses, prescribing habits of GSK products for particular disease states, prescribing statistics of competitor products, market share, volume of prescriptions filled, etc. This information, together with notes from previous physician visits and GSK training, I was able to populate the business plan template.

28. GSK policies, including the Commercial Practice Policies ("CPP") limited and restricted my authority and discretion regarding matters of financial impact.

29. I received a modest yearly budget for each product to provide lunches and dinners as a means to provide additional educational opportunities. This budget was subject to strict CPP guidelines.

30. I did not have the authority to commit GSK in matters having a significant financial impact.

31. Although I was bound to follow GSK policy, I did not create, modify, alter or develop GSK policies.

32. I did not have the authority to formulate GSK policies or operating practices.

33. I did not have the authority to affect GSK policies or operating practices.

34. I did not have the authority to interpret or implement GSK policies or operating practices.

35. I did not determine the overall course or policies of GSK's business.

36. I did not have the authority to deviate from or waive company policy without permission.

37. I was one of several thousand PSRs employed by GSK. My work alone did not affect the business operations of GSK to a substantial degree.

38. I did not have the authority to negotiate or bind GSK on significant matters.

39. I was not involved in planning long or short term objectives for GSK.

40. I did not investigate and resolve matters of significance for GSK management.

41. I did not represent the company in handling official complaints, arbitrating disputes or resolving grievances.

I declare under penalty of perjury that the above statements are true, accurate and based on my personal knowledge of the facts and issues in this case.

July 30, 2009
/s/
Michael Shane Christopher

APPENDIX H — DECLARATION OF FRANK BUCHANAN IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JULY 30, 2009

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Case No. CV08-01498-PHX-FJM

Michael Shane Christopher, filing individually and on behalf of all others similarly situated; and Frank Buchanan, filing individually and on behalf of all others similarly situated;

Plaintiffs

vs.

SmithKline Beecham Corporation,
d/b/a GlaxoSmithKline;

Defendant.

Appendix H

DECLARATION OF FRANK BUCHANAN IN SUPPORT OF PLAINTIFFS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I, Frank Buchanan, declare and state the following:

1. I am over eighteen years of age, and I make this declaration based on my personal knowledge related to the facts and issues involved in this case.

2. I am a named Plaintiff in the above captioned case. I joined this collective action as an individual and on behalf of all other similarly situated current and former GSK employees.

3. I am currently a resident of Gilbert, Arizona.

4. Unless otherwise stated, my personal knowledge of the matters and issues addressed and discussed in this declaration are based on multiple factors including: my own personal observations and experiences while working for SmithKline Beecham Corporation d/b/a GlaxoSmithKline ("GSK"); my work as a trainer chosen by GSK to train other GSK pharmaceutical representatives; conversations with other GSK pharmaceutical representatives both in my own work areas and at national and regional GSK meetings, conventions and training sessions; feedback and information presented by GSK and GSK management at national and regional GSK meetings, conventions

and training sessions; feedback and conversation with my supervisor, with members of GSK management and with individuals in GSK human resources; and GSK policies, guidelines and procedures applicable to all GSK pharmaceutical representatives. For the purposes of this declaration the term "pharmaceutical representative" refers to any and all current or former GSK employee working as Sales Representative/Pharmaceutical Sales Representative, Senior Sales Representative/ Pharmaceutical Senior Sales Representative or Executive Sales Representative/Pharmaceutical Executive Sales Representative in the United States.

5. GSK is in the business of developing and selling prescription medicines and drugs and over-the-counter consumer healthcare products.

6. I was employed by GSK from September 2003 through March 2008. I first held the position of Pharmaceutical Sales Representative and later was promoted to the position of Pharmaceutical Senior Sales Representative. My duties did not change significantly.

7. While employed at GSK I did not work in any of the following positions: fax, finance, accounting, auditing, quality control, advertising, marketing, research, safety and health, personnel management, human resources, or labor relations. My duties were limited to those of a Pharmaceutical Sales Representative or Pharmaceutical Senior Sales Representative.

8. I did not act as an advisor to the marketing or product development departments, or any other GSK department.

9. While employed with GSK I did not supervise any employee, manage any department or run GSK's business.

10. While employed by GSK, I was first assigned to visit physicians in and around Flagstaff, Lake Havasu City, Bullhead City, Show Low, Cottonwood and Page, Arizona. During this time, I worked out of a home office in Flagstaff, Arizona. In approximately August 2005, I transferred to Phoenix, Arizona and was assigned to visit physicians in and around the Phoenix, Arizona area. During this time I operated out of a home office in Gilbert, Arizona.

11. "Detailing" is a word I have heard and used to describe my primary duties and activities as a pharmaceutical representative and the primary duties and activities of other pharmaceutical representatives (hereinafter "PSRs"). I have also used the terms "marketing" and/or "promoting" to describe the primary duties and activities of a pharmaceutical representative. Detailing is more commonly used and understood within this field and more accurately describes the primary function of pharmaceutical representatives.

12. Detailing includes physically visiting assigned healthcare providers, within the assigned geography and giving them the core messages approved by GSK.

13. I received instruction and training from GSK regarding what information to discuss with physicians.

14. My core responsibility was to educate and influence physicians.

15. Pharmaceutical representatives are resources for physicians to bring them information and awareness of the safety, efficiency and tolerability of GSK products.

16. A typical detailing visit included discussing the GSK products, clinical benefits of GSK products, dosing benefits, patient types that GSK products would benefit, and responding to physician questions and objections.

17. I repeatedly used the same responses with physicians that GSK provided over and over again.

18. I was trained to ask for a commitment from a physician such as reading a clinical study on a GSK product, write a prescription, go to a dinner program or attend a weekend convention.

19. Detailing does NOT in any way include any of the following: a sale of pharmaceutical products, an exchange of any kind for pharmaceutical products, a contract to sell pharmaceutical products, a consignment for sale of pharmaceutical products, a shipment for sale of pharmaceutical products, or any other transfer of possession, title, or other disposition of pharmaceutical

products other than samples according to GSK policy and procedure.

20. I worked with other pharmaceutical representatives in groups or pods within the assigned territory that may have also been assigned to visit the same physician. We relied on each other, our supervisors, and GSK data to establish our routing plans.

21. It was impossible to know whether I individually influenced the prescribing habits of physicians when there were a myriad of other factors, including other PSRs who called upon the same physicians. GSK utilized other marketing methods such as TV ads or print media. Some physicians independently researched GSK products. Pharmacists could also influence the dispensing of medication.

22. It is not possible to link the sale of a GSK product to a patient who fills the prescription at a pharmacy to what I did in a meeting with a physician.

23. There were physicians on my target list who refused to see me or other PSRs. Yet, some of those physicians still prescribed GSK products. To the extent the prescriptions written by these physicians influenced market share, I was not responsible for it.

24. Less than one-half of my compensation at GSK was incentive compensation.

25. GSK directed which products to discuss with each physician by a quarterly Plan of Action. The plan indicated the incentive compensation weight given the products I was responsible for.

26. GSK provided reports regarding reach and frequency which listed my assigned physicians and stated how often each physician should be visited in a quarter. This established GSK's expectations of how often I or my team was expected to have face-to-face meetings with the listed physicians during a quarter which was anywhere from 1 to 10 times.

27. I was expected to listen to voice mail four times per day, transmit required reports and information nightly via the Passport system, timely respond to emails, carry a cell phone everywhere except in the physician's offices, hold regularly scheduled meetings with team members, carry a laptop computer at all times when working, and record action notes in Passport for each call upon a physician.

28. I exercised little if any discretion in preparing business plans.

29. To create my business plan I followed a template provided by GSK that included pre-printed columns and topics to assist in completing the business plan. GSK provided training, reports, and information used to create the business plan.

30. By applying the training and skills taught by GSK, together with the information provided in reports by GSK, I was able to read the reports, interpret the data, and populate fields in the business plan template provided by GSK.

31. GSK directed me who to visit. For example, I received a directive to focus on the top 250 physicians in my assigned territory for the assigned disease states. GSK provided reports listing the top 250 physicians and included their names, addresses, prescribing habits of GSK products for particular disease states, prescribing statistics of competitor products, market share, volume of prescriptions filled, etc. This information, together with notes from previous physician visits and applying GSK training, I was able to populate the business plan template.

32. I used data provided by GSK to input information onto Excel spreadsheets to reflect marketing or trends unique to my team.

33. GSK policies, including the Commercial Practice Policies ("CPP") limited and restricted my authority and discretion regarding matters of financial impact.

34. I received a modest yearly budget for each product to provide lunches and dinners as a means to provide additional educational opportunities. This budget was subject to strict CPP guidelines.

35. I did not have the authority to commit GSK in matters having a significant financial impact.

36. Although I was bound to follow GSK policy, I did not create, modify, alter or develop GSK policies.

37. I did not have the authority to formulate GSK policies or operating practices.

38. I did not have the authority to affect GSK policies or operating practices.

39. I did not have the authority to interpret or implement GSK policies or operating practices.

40. I did not determine the overall course or policies of GSK's business.

41. I did not have the authority to deviate from or waive company policy without permission.

42. I was one of several thousand PSRs employed by GSK. My work alone did not affect the business operations of GSK to a substantial degree.

43. I did not have the authority to negotiate or bind GSK on significant matters.

44. I was not involved in planning long or short term objectives for GSK.

45. I did not investigate and resolve matters of significance for GSK management.

46. I did not represent the company in handling official complaints, arbitrating disputes or resolving grievances.

I declare under penalty of perjury that the above statements are true, accurate and based on my personal knowledge of the facts and issues in this case.

July 30, 2009

/s/

Frank Buchanan

APPENDIX I — DEPOSITION OF JOSEPH M. GOLSON, III IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED JUNE 10, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT Of ARIZONA

No. CVOS-01498-PHX-FJM

MICHAEL SHANE CHRISTOPHER, filing individually and on behalf of all others similarly situated; and FRANK BUCHANAN, filing individually and on behalf of all others similarly situated;

Plaintiffs,

vs.

SMITHKLINE BEECHAM CORPORATION,
dba GLAXOSMITHKLINE,

Defendant.

DEPOSITION OF JOSEPH M. GOLSON, III

Mesa, Arizona
June 10, 2009
9:33 o'clock a.m.

* * *

[9] Q. Where do you work?

A. I work at GlaxoSmithKline.

Q. Okay. And where do you work? Do you work out of an office, out of your home?

A. I work out of my home.

Q. Okay. And what. is your current position?

A. I'm what they call a PSR, Professional Sales Representative.

* * *

[20] Q. Does the company -- since you've been working in your current position as a PSR, does the company have a set guideline or expectations that the PSRs are supposed to visit so many physicians in a day?

A. Yes.

Q. What is that expectation or guideline?

A. Average of eight physicians.

Q. And you've mentioned your typical work schedule. Is that 8:30 to 5:00, is that the work schedule that the company asks the PSRs to work?

MS. JOHNSON: Objection; overly broad. Go ahead.

THE WITNESS: I can only answer for our division, the Pharma Division. For that division the answer is yes.

* * *

[23] Q. Is not, okay. All right. What is your -- do you have a more specific job --

A. Yes.

Q. -- title?

A. Yes, I --

Q. Which one is it?

A. It's senior executive representative.

Q. All right. And how was it communicated to you that the Pharma Division has an expectation that a PSR -- and I'll refer to that broadly to include these various positions in Paragraph A of Exhibit 1.

How is it that you know that the company has an expectation that individuals working as PSRs are supposed to be out in the field 8:30 to 5:00?

A. From communication from the company in a document called "Winning Expectations."

Q. Okay. Any other basis for having an understanding that the Pharma Division has an expectation that its PSRs are to be in the field from 8:30 to 5:00?

A. I'm sorry. Say it again.

Q. Sure. Is there any other -- have you heard that anywhere else, such as meetings, or have you had any training? Or have there been any other communications [24] other than Winning Practices where you have received instruction that the Pharma Division has an expectation that the PSRs work from 8:30 to 5:00 in the field?

A. It would be Winning Expectations just to correct, but --

Q. Okay.

A. -- that's communicated also by our RVP; at a regional sales meeting expectations are sometimes communicated again and from my DSM.

Q. Okay. Have you ever heard that DSMs have the discretion of changing the 8:30-to-5:00 expectation for the PSRs in the field?

A. No.

* * *

[179] Q. And is it fair to say that there was also training on how to close a conversation with a doctor?

A. Yes.

Q. And I think you said in your case that you would like to ask the doctor to commit to prescribe whatever medication?

A. I said I wanted a commitment. That doesn't always mean a commitment to prescribe, because they may not be to that point yet.

Q. Okay.

A. But it may be a commitment to read an article and discuss it -- agree to discuss it on our next visit. It could mean that they would give a trial to some patients to see how it worked in their hands.

Q. Okay.

A. It could mean a lot of different things, but you want to leave with a commitment.

* * * *

APPENDIX J — DEPOSITION OF GREGORY W. PETERSON IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA, DATED JUNE 11, 2009

IN THE SUPERIOR COURT
OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

Case No. CV08-01498-PHX-FJM

MICHAEL SHANE CHRISTOPHER, filing individually and on behalf of all others similarly situated; and FRANK BUCHANAN, filing individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

SMITHKLINE BEECHAM CORPORATION, dba GLAXOSMITHKLINE,

Defendant.

DEPOSITION OF GREGORY W. PETERSON

Mesa, Arizona
June 11, 2009
9:31 o'clock a.m.

* * *

[6] Q. Okay. Where are you currently working?

A. I work for GlaxoSmithKline.

Q. What is your current position?

A. I'm the executive account manager.

Q. Can you tell me what your duties are in that position?

A. Yes. I have primary responsibility for the interactions with the majority of the health plans, insurers in Arizona.

Q. Do you supervise anyone?

A. I do not.

Q. So currently you don't have any supervisory authority or any direct connection with any of the reps in the field?

A. That's correct.

Q. Okay. How long have you had this position?

A. Officially since April of this year.

Q. What was your position prior to the current position you're holding now?

A. I was an executive account manager for employers in California.

Q. So were you doing essentially the same job functions that you're doing here in Arizona, or different [7] functions?

A. Generally the same, different customer.

Q. Okay. Did you supervise anyone when you were working in California?

A. I did not.

Q. And how long did you hold that position in California?

A. Officially, December 2007 until the end of April, 2009 -- or end of March, 2009.

Q. Can you describe what you're actually doing in your current job?

A. There are two primary focuses of my job. With one account, I am responsible for negotiating a direct contract between GlaxoSmithKline and the customer.

In the other cases, I'm working with accounts that I don't have direct contracting responsibility for. So I offer them our resources, services and resources, educational, patient educational type materials and the like, providing information on our medicines.

Q. You offer that information to whom?

A. To the insurer.

Q. Okay.

A. To various clients within the customer.

Q. When you say "customers" and "clients," can you [8] tell me who those people are.

A. Typically they're staff within the pharmacy department at the insurer.

Q. Okay.

A. Medical or the clinical staff within the insurer. Oftentimes the medical management staff within the customer.

Q. Okay. So I think I've got you back to December of 2007 working in this position in California.

Prior to that, where did you work?

A. I was a regional vice-president of sales for what we call the Desert Mountain Region.

* * *

[22] Q. Did the company have an expectation, during the relevant time period, of how long a PSR was to work in the field?

A. My recollection was that it was 8:30 to 5:00.

Q. And your recollection is based on what?

A. Documentation policy, I believe, if I'm not mistaken.

Q. Okay. Did that time ever change while you were -- during that relevant period of time?

A. Not that I'm aware of.

Q. How about before? Now we're going to go back before that time.

Did the time ever -- was the time ever different from the time that you were a regional vice-president from 1995 up through 2007?

A. My recollection, it was that way from the beginning --

[23] Q. Okay.

A. -- during that time.

Q. Is it your belief then that your DSMs did not have the authority to allow PSRs to work a different schedule?

A. Say that again.

Q. Sure. Is it your understanding then that the company policy was that a PSR was to work in the field 8:30 to 5:00, correct?

A. That's correct.

Q. And is it also your understanding that the DSMs did not have the authority to alter that schedule?

A. They may have altered the schedule.

Q. For what reasons?

A. I don't know.

Q. My question is, did the DSMs that you supervised have the authority to make changes to that schedule?

A. The expectation was to be in the field -- for the PSR to be in the field from 8:30 to 5:00.

* * *

[27] Q. Let's go to what you understand the duties of a PSR to be. Can you tell me what you understand those duties to be during the relevant period of time?

MS. JOHNSON: Objection; overly broad.

THE WITNESS: Primary responsibility is to promote our medicines to prescribing customers, prescribing physicians.

Q. BY MR. PRUITT: Who is the customer when you say "customer" ?

A. The prescriber.

Q. Okay. And can you describe for me, based on your understanding, how that takes place?

A. The representative essentially communicates the features and benefits of our medicines to the physician.

Q. Anything else?

A. That's it.

Q. Okay. And that occurs in what manner?

A. Help me to

Q. That occurs by

A. Face to face.

Q. -- the PSR going to meet the doctor and have a face-to-face meeting?

A. Correct.

Q. And these meetings are supposed to be face to face; is that correct?

A. Correct.

* * *

[29] Q. And the hope is what, out of these meetings?

A. The hope is to gain physician commitment to prescribe our medicines for the appropriate patient.

Q. Okay. Is there any way of tracking whether that actually occurs?

A. There is data that monitors the prescribing of physicians.

Q. Is there any way to link it up directly with what the PSR did, though?

A. In a quantitative way?

Q. Yes.

A. The data that assesses sales performance from baseline.

Q. You worked in the marketing department of GSK for some time; is that right?

A. That's correct.

Q. What methods does GSK use to market their products?

MS. JOHNSON: Objection; overly broad.

Go ahead.

THE WITNESS: There are many.

Q. BY MR. PRUITT: Can you describe what they are?

A. The direct consumer, advertising, mail advertising. The primary -- the primary method is through our sales organization.

[30] Q. So any other methods other than what you've described?

A. Not that I'm aware of.

Q. So you have a direct mailing, you have media, TV, print media; is that right?

A. Correct.

Q. And then you have the reps that go out to meet with the doctors?

A. That's correct.

Q. So let's talk about the different medias for a minute.

When we turn on the TV and we see a commercial for Advair, for example, can you tell me is that directed to the end user?

MS. JOHNSON: I'm going object to the extent that this is not a 30(b) (6) witness. He's here to testify about his personal knowledge. He does not have personal knowledge of all of GSK with respect to marketing.

To the extent that he has knowledge based on his work two years ago -- I mean for two years many years ago in the marketing department, perhaps even before GlaxoSmithKline was formed, he can answer the question.

But there's an ongoing objection to him [31] answering with respect to all of marketing and all of GSK.

Go ahead.

THE WITNESS: Can you repeat the question?

Q. BY MR. PRUITT: Focusing on TV commercials, do you know what the intended people are for those? Is that the end user, or is that doctors, or do you know?

A. I do not know. But I would -- from my line of thinking, it would be the end user and the physician --

Q. Okay.

A. -- and the prescriber.

Q. So the hope is that the end user will ask questions of their doctor about a particular medication, correct?

A. The hope is that the patient or the customer becomes more learned about their condition and may want to engage in a discussion with their physician about it.

Q. Okay. And if the end user does do that, the patient, it's possible that the doctor could prescribe the medication just simply because he or she is being asked by his or her patient, correct?

MS. JOHNSON: Objection; calls for speculation.

THE WITNESS: It's possible.

Q. BY MR. PRUITT: Sure. And there's also a print media that's sent to end users as well; is that correct?

[32] A. Yes.

Q. Is there also publications in trade magazines that doctors read?

A. Advertisement?

Q. Well, yes, advertisement in trade magazines.

MS. JOHNSON: If you know.

THE WITNESS: Yes.

Q. BY MR. PRUITT: Okay. And that's not directed to the end user. That would be directed to the doctor, correct?

A. Presumably.

Q. It's possible that doctors may prescribe GSK medication based on what they read in trade magazines, correct?

A. It's possible.

Q. In fact, isn't it true that you have doctors that prescribe GSK medication who don't have time to see PSRs?

MS. JOHNSON: Objection; calles for speculation.

THE WITNESS: Could be.

* * *

[35] Q. BY MR. PRUITT: Just so I understand what's -- what the PSRs are actually doing in meeting with the doctors, they don't actually have a briefcase full of medications that they're selling to these doctors, correct?

A. That's correct.

Q. There's no money changing hands, product being handed over to doctors in return for money; is that correct?

A. That's correct.

Q. There isn't anything that -- there's no contract for a future purchase or anything like that signed?

MS. JOHNSON: Objection; calls for a legal conclusion.

Go ahead.

THE WITNESS: I would call it an unwritten contract.

Q. BY MR. PRUITT: What do you mean by that?

A. The goal of the sales representative is to gain commitment from the physician to prescribe our medicines based on their merits to the appropriate patient.

* * *

[40] Q. Sure. Is there a way -- does GSK, to your knowledge, have any documentation or data, any marketing analysis or test that evaluates whether there is a direct connection between a PSR meeting with a physician, and an end user customer, a patient, buying a GSK medication?

MS. JOHNSON: I'm going to object; vague and ambiguous.

Go ahead.

THE WITNESS: I'd ask you to clarify. You're asking me to answer if there's a connection between what a representative does and a patient?

MR. PRUITT: That's correct.

THE WITNESS: To my knowledge, no.

Q. BY MR. PRUITT: So a PSR is not supposed to have any contact with a patient, right?

A. That's correct.

Q. They can't sell any medication directly to a patient. It has to go through a doctor, correct?

A. That's correct.

Q. So my question, though, I guess, is: How do you know that a PSR who meets with a doctor, that it's [41] because of what the PSR said or did during that meeting that the end user actually takes that script and buys the medication?

Is there any GSK documentation that you're aware of that actually connects those two events together?

MS. JOHNSON: Objection; compound, vague and ambiguous.

THE WITNESS: As I said before, the documents that we have is on sales performance.

MR. PRUITT: Okay.

THE WITNESS: Number of scripts generated.

Q. BY MR. PRUITT: But those sales documentation do not reflect whether those scripts were generated because of what the PSR did versus whether the patient saw the medication on the Internet, or on TV, or read about it, or whether the doctor prescribed because the doctor read about it in a trade magazine.

Is there any way of directly connecting it to what the PSR does in visiting with that doctor?

A. There -- to my knowledge, there may be market research generally, but I don't know if there's anything specific to an individual.

Q. Okay. You're not -- aware -- of any specific market research that would be able to connect a PSR directly to [42] an end user sale; is that right?

A. There may be data that -- research that shows the impact of a sales representative versus the other methods that you mentioned in your question. I don't know, though.

Q. But you would agree with me there are potentially other variables involved in why an end user would take a script and actually buy the medication other than just the PSR meeting with the doctor?

A. Repeat your question, please.

Q. Would you agree with me, though, that there are other variables that may influence why a patient either asks for a script of Advair, for example, or whether a doctor prescribes Advair to a patient, other than what -- other than the fact that a PSR may have met with that doctor?

MS. JOHNSON: Vague and ambiguous.

THE WITNESS: I would agree that there may be *other factors that influence.*

* * *

[72] Q. And I think we've talked about those other strategies before, TV, printed media, publications in trade magazines, for example.

And you were aware that those marketing efforts were in place when you were a regional vice-president during the relevant time period; is that correct?

A. Yes.

Q. You mentioned that the primary duty was to promote our medicine, and then you mentioned that *including* -- that *selling* was part of that promotion.

What exactly, in your understanding, is sold when a PSR *meets with a physician?*

A. What is sold?

Q. Yeah, what is sold?

A. What is sold is the information -- or what is promoted is the information around our product. What is sold is the notion that the physician will find it useful, that medicine, for his or her patients.

* * * *

APPENDIX K — DEPOSITION OF THOMAS J. TYMA IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED JUNE 12, 2009

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MICHAEL SHANE CHRISTOPHER, filing similarly and on behalf of all others similarly situated; and FRANK BUCHANAN, filing individually and on behalf of all others similarly situated;

Plaintiffs,

vs.

SMITHKLINE BEECHAM CORPORATION, d/b/a GLAXOSMITHKLINE,

Defendant.

Case No. CV08-01498-PHX-JF1M

DEPOSITION OF THOMAS J. TYMA

Mesa, Arizona
June 12, 2009
9:34 o'clock a.m.

* * *

[6] Q. Okay, great. Now you are currently employed by the defendant GSK; is that right?

A. Correct.

Q. What's your position?

A. I'm a district sales director.

Q. And how long have you had that position?

[7] A. About a year and a half this time. I've been with the company 27 years. I've been a district sales manager before in my history.

* * *

[9] A. And there are -- the last position I had before I came out, I was senior manager of professional relations for the respiratory products.

Q. And before you were in the home office for seven years, do you recall what position you had back then?

A. I do. Prior to going inside to become a product manager I was a district sales manager.

Q. And how long were you district sales manager?

A. About three years.

Q. And before you were a district sales manager?

A. A professional sales representative.

Q. And we've been using PSR shorthand for Professional Sales Rep; is that okay?

A. My entire life is acronyms, correct.

* * *

[34] Q. To your knowledge, is there a company expectation as to how many physicians they should see in a day?

A. They're the guidance --

MR. ANDERSON: Objection as to time frame.

Q. BY MS. CROCKETT: During the last year and a half that you've been district sales director?

[35] A. There's about nine physicians, nine to ten physical calls a day, and at least three pharmacy calls per day.

* * *

[45] [Q.] As part of a sales call, are the PSR's in your district expected to cover the patient type and disease state for the drug that they're promoting?

A. Yes. They're actually supposed to look prior to the call at the data to see what someone is doing and to actually talk about a patient type or something that will actually, based on the data that they see, be able to get in the conversation to have a discussion.

If a patient -- if a physician was writing say a competitive product, you would probably set up a scenario with a patient type to where you could find out why that physician was writing that competitive product than the patient type you may [46] present. We would have advantages that you would then want to be able to do a comparison with that physician. And so it depends on what you see in the pre call and then what you would want to communicate.

But what you're really trying to do is get down to the individual. You're having a dialogue with the physician and trying to get down to their individual needs. There are some things that we can communicate that are hot buttons, but if you don't get down to the individual physician's needs you may be talking about something they don't have an interest in.

Q. Okay. And I'm still looking at that same bullet point, the second point says, "Translating product features into benefits." You talked about that a little bit previously I believe.

Is that something that the PSR's in your district would be expected to do on every call?

A. Yes. You present features, the patient benefits, but more importantly you have to validate that what you're presenting is important to that individual customer.

Q. Okay. And would there be, for example, do the -- strike that.

Do the PSR's know like a list of product [47] features or benefits which they are permitted to talk about with the physician?

A. Yes.

Q. Are they allowed to talk about any product features or benefits which are not on that list?

A. They're not allowed to talk about things that are outside of label.

Q. Is that referred to as off label?

A. Yes.

Q. So would you consider that all of the different product features or benefits of a particular medication are part of the core selling message associated with that medication?

A. No.

Q. Why not?

A. Because there may be something that you uncover with a physician that's more important than maybe that was in the -- because the core message is very brief and it's more of a concept. You may find something more important that they are interested in that isn't there in the course of your conversation.

* * *

[49] Q. Okay. How do PSR's become familiar with the different elements of the core selling message?

A. We talk about a strategic focus of what we're going to try to accomplish or where there should be the most gain. So there's actually -- it's kind of a core selling, but there's also we'll have different clinical studies to present within a particular quarter, that may be against competitive products.

They may address a safety or efficacy concern, there may be more detailed information. It's almost like the core place to get you started. It's not -- if you just did that, you wouldn't accomplish -- if you just went in and set a core message and did something and left, you wouldn't be -- that's not an interaction, that's not selling, that would be ridiculous. You wouldn't be able to do it, you would have to get down to the individual needs. So that's really what you're trying to accomplish. It's a starting point, and then their job is to get into a clinical discussion.

Q. You said we'll talk about and you mentioned several things. I guess my question was how do they -- how do the PSR's become aware of the core selling message or the different things that they're [50] expected to present to the doctor?

MR. ANDERSON: Objection. Just to make sure it's clear, when you talk about PSR's, unless stated otherwise, you're talking about the PSR's that reported to Mr. Tyma during the time that he was a DSM?

MS. CROCKETT: During the last year and a half, yeah. In fact, yea, we can assume that for the rest of the deposition unless I say otherwise.

MR. ANDERSON: Okay.

THE WITNESS: Any time there is a new competitor, any time there is a new piece of literature or a clinical study that we're allowed to use, any time there's a new detail aid that helps and guides you through a clinical discussion with some keys points that should be of interest to that physician and that selling state, that is reviewed.

Whoever created it in marketing discusses why they created it, what the intent of the data, you know, the significance of the data and what it's intended to communicate towards the benefit of that product. And so it's done with guidance from sales training and from marketing, and it's part of the strategic direction that gets pushed down.

Q. BY MS. CROCKETT: And so do they, and by [51] "they" I mean the reps in your district, do they receive this information in meetings or physically how do they receive the information that they are to present, in the mail?

MR. ANDERSON: Objection; compound.

THE WITNESS: We have meetings where we do it, they have to go and take training modules.

Q. BY MS. CROCKETT: What do they learn in the training modules?

MR. ANDERSON: Objection; call for speculation.

Q. BY MS. CROCKETT: To the extent that you know.

A. It would depend on what the scope of what the training module was about. It would be -- there are many training types of modules on competition or different clinical papers, so.

* * *

[99] [Q.] Are you, Mr. Tyma, are you aware of any other ways that the company markets its medication aside from PSR visits to doctors?

A. Yes.

Q. What are some of those ways?

MR. ANDERSON: Objection as to time frame.

Q. BY MS. CROCKETT: Let's limit to the last year and a half that you've been a DSM.

A. And do you mean pharmaceuticals in general or GlaxoSmithKline.

Q. GlaxoSmithKline.

A. If we have new products, we do journal [100] advertising. We have transitioned. We used to have a very large presence at medical conventions, which even though it's staffed with PSR's, it's a different environment. But more and more I think we're transitioning from that to helping them educate in that process. There is, depending on the product, there can be direct consumer television, radio, and print advertising.

Q. When you say "direct consumer," those are ads that are directed to the patients, the end user?

A. Yes.

Q. Anything else?

A. There is direct mail.

Q. To whom?

A. Physicians. There is Internet ways to communicate with providers, slang is ED tailing.

Q. Do the PSR's under your supervision have anything to do with ED tailing?

A. No. There are other sales representatives in another location somewhere who do that. So mail, ED tailing, and there is telephone communications.

Q. What kind of thing -- direct telephone calls to physicians?

A. Uh-huh.

MR. ANDERSON: Is that a yes?

[101] THE WITNESS: Yes.

Q. BY MS. CROCKETT: Have you heard of instances in which patients go to their doctors and request prescriptions for GSK medications because of ads that they saw on TV or in print?

A. Yes.

Q. Now another question, are there doctors who refuse to receive visits from PSR's?

A. Yes.

Q. And again let me limit that question to doctors within the region that's under your supervision.

MR. ANDERSON: Objection to the form.

Q. BY MS. CROCKETT: Do you understand?

MR. ANDERSON: You used the word "region," it's district.

Q. BY MS. CROCKETT: Is district the correct term I'm sorry, within the district under your supervision.

So my question is, just clarify for the record, are there doctors within the district that's under your supervision that you know of who refuse to receive visits from PSR's?

A. There are physicians who refuse visits, there are physicians who limit visits.

[102] Q. And of the doctors that refuse visits, are you aware of whether some of those doctors nevertheless prescribe some of the GSK's medications marketed by your PSR's?

A. Can you help me, rephrase it?

Q. Sure. My question is if there's a doctor who that you're aware of that refuses to receive visits from a PSR, do some of those doctors nevertheless actually prescribe some of the GSK medication?

MR. ANDERSON: Objection; calls for speculation.

THE WITNESS: It's -- I actually, if I can see the data and if their data isn't blinded, which is another thing that they can do, the answer to your question could be there are some that do, there are some that do not.

Q. BY MS. CROCKETT: You see data, prescribing data about individual physicians; is that correct?

A. I do.

Q. So can you -- have you ever seen of an instance where a physician that refuses to receive PSR visits is nevertheless prescribing GSK medication?

A. Yes.

* * *

[110] Q. BY MS. CROCKETT: Let's back up for a second. I said that a moment ago that it was my understanding that they have some administrative tasks to perform at home outside of the 8:30 to 5:00 time frame, correct?

A. Some of it they can do in the field. If they choose to do it, it's like your call reporting, they have to put in their calls and transmit it. Many reps just do that in the field as they go along. Some wait until they go home. You know, you need to get it done, you have to choose how you -- how you optimize your time is for them. Some prefer to do it I think in the evening. It's up to them.

Q. So call reporting, as an example, what are some of these other tasks that they need to perform on a regular daily basis?

A. It's -- the scope of the question is too narrow. It's not a daily basis, but there are other tasks that they need to perform. They may have -- we [111] may have a new clinical reprint or learning module, we may be launching a new product. And so they will be given a time frame in which to review that module and take a test so that they are competent. They may do that in the evening, they may shoot for it during the day, but there will be study time, so they may choose to do that in the evening.

Q. Is there -- are you able to give me any kind of average as to how often that occurs that they have studying to do with learning modules and reprints?

A. It has to do when they come out. So I can't -- the other thing is they have to answer their calls. They need to -- the other thing they have to do is to have to check e-mail. Their machines are not live. When they get messaging, it downloads to the machine. And then so when they go home, when they have all their calls and they have to push it in or have it call in to download and then get their e-mails. And they should read their e-mails daily. They should check their e-mail daily. There may be something there but something not, so that would be another thing.

Q. So essentially they have to plug in at some point during the day to exchange this?

A. Right.

APPENDIX L —SUR-REPLY IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

EARL LEE FAULK, as Administrator of the
estate of MARCUS EARL FAULK, Deceased,

Plaintiff,

v.

SMITHKLINE BEECHAM CORPORATION
d/b/a GlaxoSmithKline, et al,

Defendants.

SMITHKLINE BEECHAM CORPORATION'S SUR-REPLY IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

Recognizing that he has presented no evidence of personal culpability on the part of Rick Letner, Cynthia Robinson or Leo Bullock (the "Employees"), Plaintiff now submits an alleged GSK web-site posted job description in an eleventh hour attempt to suggest that the Employees had some material factual connection to Plaintiff's claims.[1] They do not. The job description, like Plaintiff's motion to remand, and reply brief, fails to provide any evidence that the Employees committed any act that would permit recovery against them.

Plaintiff's attempt to use the job description and its reference to "sales" as a way of imposing liability on the Employees does not establish any nexus between the Employees and plaintiffs decedent. All the job description does is show that GSK seeks to hire qualified, well-educated individuals. Certainly, that is not sufficient to defeat federal subject matter jurisdiction. Pharmaceutical sales representatives, unlike other sales personnel, are unique in that they do not personally "sell" the product; rather, they are merely a conduit for information between the manufacturer and the physician -an interpretation embraced by the only courts to squarely analyze the issue under Alabama law. *See In re: Rezulin Prod. Liability Litigation,* 133 F. Supp.2d 272, 287-88 (S.D.N.Y. 2001) (applying Alabama law) (pharmaceutical representatives are not sellers or suppliers and cannot be held liable under AEMLD); *Andrews* v. *Bayer Corp. (In re: Baycol Prod. Litigation),* No. CV-63-4392 (D. Minn. March 26, 2004) (applying Alabama law)(holding that district sales managers and sales representatives are not sellers of prescription medication as contemplated by the AEMLD or Alabama state law claims of negligence or breach of warranty). Further, plaintiff's tactic of using a web-site posted job description to support a claim against a pharmaceutical sales representative has been rejected by at least one federal court in Alabama. See *Fowler* v. *Pharmacia and Upjohn Company*, No. CV-04-PT-712-M, Slip Op. at 13-14, 30 (N.D. Ala. June 24, 2004) (Exhibit "A") (web-site posted job description did not support claim against the phannaceutical sales representative where there was "no evidence that [sales representative] personally or actively sold or promoted thc alleged product to applicable pharmacies or physicians after he had knowledge that the product was dangerous or defective or after he had knowledge that the warnings had not been otherwise appropriately given").

---

[1] Defendant, SmithKline Beecham Corporation d/b/a GlaxoSmithKline Kline ("GSK"), incorporates by reference its previously asserted arguments found in its notice ofremoval and opposition to remand brief, which establish that the non-diverse individual defendants, Rick Letner, Cynthia Robinson and Leo Bullock have been fraudulently joined in a transparent attempt to defeat federal subject matter jurisdiction.

There is no possibility Plaintiff can establish a cause of action against the GSK employees llalned in Plaintiff's Complaint. Accordingly, this Court should find that the Employees - Rick Letner, Cynthia Robinson and Leo Bullock - have been fraudulently joined and, therefore, deny Plaintiff s Motion to Remand and grant the motions to dismiss filed by the Employees.

Respectfully submitted,

HELMSING, LEACH,
HERLONG, NEWMAN,
& ROUSE, P.C.

By: */s/ Russell C. Buffkin*
JOSEPH P. H. BABINGTON (BAB004)
RUSSELL C. BUFFIKIN (BUF008)
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DEFENDANT SMITHKLINE
BEECHAM CORPORATION

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APPENDIX M — DEPOSITION OF JEFFREY SCOTT NASH IN THE UNITED STATES DISTRICT COURT DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA
CIVIL ACTION NO. CV08-01498-PHX-FJM

MICHAEL SHANE CHRISTOPHER, FILING INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; AND FRANK BUCHANAN, FILING INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

PLAINTIFFS

VS.

SMITHKLINE BEECHAM CORPORATION, D/B/A GLAXOSMITHKLINE,

DEFENDANT

DEPOSITION TAKEN ON BEHALF
OF THE PLAINTIFFS
BY: NOTICE

WITNESS:
JEFFREY SCOTT NASH

* * *

[8] Mr. Nash, can you tell me what your current position with GSK is?

A. I am an immunization account manager.

Q. Tell me what your duties are with respect to that position.

[9] A. I'm responsible for selling the vaccine portfolio for GSK to various customers at the state level, Department of Defense, which includes Fort Campbell, Fort Knox, and then also teaching universities, University of Louisville and the hospital systems affiliated with that.

Q. When you say that you sell vaccines, do you do that directly to the end user?

A. I'm not sure what you mean by that.

Q. Well, can you describe for me what you mean by selling vaccines?

A. Well, I would--for example, in my situation, I would potentially go to--let's use the University of Louisville as an example. Sit with those folks, talk about the needs that they have, have a dialogue around, you know, where they're going to be immunizing, what they might be doing, and position, you know, the products that we have towards those needs. And ultimately they would either decide to, you know, purchase and utilize those vaccines or, you know, potentially a competitor or just not at all.

Q. When you would have these types of meetings and there was a purchase, would the purchase be directly from GSK or would it go through a third party?

[10] A. It depends; it could be either.

Q. Do you fill out purchase contracts or anything of that nature?

A. Sometimes.

Q. Can you describe for me the nature of how you consummate sales in your current position?

A. Well, in the event that they decided to purchase from us, they have options. They can contract and purchase directly from GSK through our website and distributing network. Many of them will have contracts through what we call wholesalers where they may purchase the product directly through their wholesaler. University of Louisville is a good example of that, or any hospital, for that matter, because they'll be purchasing other items, you know, bed sheets, you know, cotton balls, all the other things that would come from a wholesaler. So they may choose, because of that contract, to go ahead and purchase our vaccines through that contract and their wholesaler, but they have those options.

Q. Okay. How long have you had this current position?

A. About two months.

Q. Okay. All right. What position did you have before this current position?

[11] A. I was a urology specialty representative.

* * *

[15] Q. When you yourself are meeting, do you have GSK contracts when the customer decides to purchase directly from the company?

A. Yes, as a representative of GSK, I would, you know, fulfill the contract or the obligation of filling out the contract, but the contract is obviously [16] with the customer and with GlaxoSmithKline and my role is just to facilitate that.

Q. And what--could you describe the material terms of the contract as far as is there a quantity, a price, a delivery date, or things of that nature?

A. Impossible to answer because each of them are unique.

Q. Okay. Am I correct, though, at least they would have a quantity of vaccine in the contract?

A. No, not necessarily.

Q. Would have a price?

A. There would be a price.

Q. Then it would have the type of vaccine that is being purchased; is that right?

A. Correct.

Q. And you have the authorization on behalf of GSK to enter into those contracts?

A. Actually I do, and--but there's multiple steps to that.

Q. Do you have the authority to sign the contracts on behalf of the company?

A. That's a good question. I don't think so.

* * *

[21] Q. But when you said that you have--when you commit a doctor, you don't have it in writing. There's no written contract, but you would hope that they would be--that they would at least follow what they verbally promised to do; is that right?

A. Yes.

Q. Has there ever--have you ever in meeting with doctors if after you committed and they agreed to prescribe, but they didn't, have you ever gone back to them on a follow-up visit and tried to commit them again to prescribe?

MS. JOHNSON: Objection, form. Go ahead.

A. I think that happens pretty often in terms of having to go back and gain additional commitment. You have to understand, in their world you don't know how many patients they're seeing that are applicable for that particular product. And typically when they say that they are going to use the product for those particular patients, they do that. Now, part of our sale cycle is to reinforce why they're starting to use this particular product for those particular patients, and as part of that reinforcement you gain additional commitment, you know, you're still starting [22] to do that. Have you seen any of those patients? Yes. How many have you started? We started, you know, several of them. You know, how's it going? So there's a continued sale cycle. It's not just you get a commitment and that's the end of it. It's you get a commitment and then there's still a customer relations. Much like many aspects of sales, there's still a customer relations piece and a, you know, progression that takes place.

Q. Based on your experience, if you commit a doctor and the doctor does not follow up on that commitment, do you have any recourse to force that commitment upon the doctor?

A. No.

* * *

[91] Q. Who is the customer base that you're referring to?

A. The physicians that were within their geography and area.

Q. When you refer to sales, you're talking about encouraging them to prescribe medication to their patients; is that right?

A. I'm referring to gaining commitments from them to actually apply that, not just encourage them.

Q. With respect to--we covered that, I think, in your example on the job that you're doing immediately before your current job. When you supervised your pharma reps during the seven or eight years that you did so, when you speak of the issue of sales, your reps would not enter into contracts with the physicians with respect to any particular--of a medication that they were communicating with the doctor about; is that right?

A. They would not enter into a written contract, no.

Q. Have you ever heard the word detailing before?

A. Yes.

Q. Tell me what you understand detailing to be with respect to a pharma rep's duties.

[92] A. Well, I think detailing--I believe that word came from a long, long time ago when folks used it loosely to describe giving the details of a product. You know, features and benefits is what we call it now. They would say giving the details of a product. So it loosely generated to the term of detailing people. It's a term sometimes transposed for, you know, having a discussion with a customer, a dialogue, and, you know, having a call, I guess, as a broader term, making a sales call.

Q. So is detailing, in your understanding, different than making a sales call or is it the same?

A. Well, I think they get used--the words get used interchangeably. I think there's a big difference in providing the details of your product versus what a sales call is and what selling is.

Q. I'm just--I'm curious about the use of that terminology at GSK.

A. Um-hum. (Affirmative)

Q. Have you used that in your--is that part of your dialogue when you talk about what a rep does?

A. No, not normally.

Q. What normally do you use as far as communicating to reps or describing what reps do?

A. Sales calls.

[93] Q. Have you—

A. Have I ever used the word? Yes, you know, but I think, like I said, they're--they're sometimes used interchangeably, but I think they're totally different things. That's my opinion. I can't speak for, you know, anybody else.

Q. As far as GSK uses that term, you can't speak for the way that GSK uses it, whether it means sales call or whether it means something else?

A. I personally think that--well, I don't know--truthfully, I don't know that GSK actually uses the term. I think that's a--that's sort of--if you could call it a slang term within the pharmaceutical world, it's probably a slang term.

Q. Have you ever heard it used at GSK by management?

A. Most likely. Like I said, it's a common word that commonly gets put in there for different meanings.

* * *

[141] Q. Does a--does a rep get compensated for prescriptions written of a particular drug that the rep is assigned to by physicians that they don't even meet with in their territory?

A. It's a possibility. It's not real likely.

Q. But isn't that what you were just saying, that compensation is not--not uniquely tied to a rep's visit with a physician? A physician may decide to prescribe Coreg CR regardless of whether they met with the rep or not, and if that rep--if that physician is in the rep's territory, it will influence the rep's [142] variable compensation?

MS. JOHNSON: Objection, form. Go ahead.

A. That could be true because, like I said, there are a multitude of things that go into that prescribing decision. For example, you know, New England Journal of Medicine, physician may pick up the New England Journal of Medicine, read the New England Journal of Medicine and decide this is a better approach and this is what I'm going to do. So that could he true and, yes, the representatives ultimately are responsible for the sales and numbers within a geography, so all of those people are visible to the representatives. All of the customers that are in a database are visible to the representatives. They would see numbers on all of those represent--or on all of those targets or all those customers. Now, some of them are more important customers than others. The representative has to decide if this person is using our product, should we start calling on them more often. If they're not using our product, is it worth going in there and trying to convince them based on how much product they're using and how many patients they see on a daily basis. So--but all of that information is visible to the representatives.

* * * *

APPENDIX N — PSR JOB ANNOUNCEMENT (CHRISTOPHER DEP. EX. 1)

PSR Job Announcement (Christopher Dep. Ex. 1)

Pharmaceuticals Sales Representative

Grade: **S10**

Reports to: **District Sales Manager**

Business Unit: **Pharmaceuticals**

Purpose:

- **Promote all GSK pharmaceutical products to customers *within territory using established protocol data and* approved promotion materials to meet or exceed established sales goals and objectives**
- **Work in conjunction with other representatives in developing strategies to increase sales of GSK pharmaceutical products in territory**

Key Responsibilities:

1. **Sell products to specific customer market according to the business plan.**
2. ***Develop local business plan to increase market share*** **by outlining tactics, activities and resources.**

3. Demonstrate thorough knowledge of GSK pharmaceutical products, competitor products and product objectives.

4. Utilize customer-focused selling techniques, continually assessing the knowledge of the customer, and strategize to maintain high customer intimacy and customer knowledge of GSK products.

5. Maintain current, approved protocol and promotional materials to be included in sales presentation.

6. Actively seek and display knowledge of key customers in territory.

7. Develop and deliver informative sales presentations based on customer needs.

8. Develop creative sales strategies to reach hard-to-see doctors / hard-to-work accounts.

9. Work collectively with other representatives in arranging speakers, displays and special programs.

10. Positively impact sales in territory.

11. As assigned, make calls on retail pharmacies and other special customers.

12. Complete administrative duties and call reporting as required in a timely manner.

13. Call on special customers with certain patient focus; e.g., pediatricians.

14. Travel, as required.

To qualify for this position:

A candidate must meet Winning Practices (threshold criteria) of:

- "Foundational" in all Winning Practices for 12 months.

- Sales results (ranked in top 50% of region/business unit for current job based on last 12 months)

- Other performance criteria, as appropriate

Winning Practices

Gain Access

1. Implements their own plan to grow the territory

2. Gains insight into key customers

3. Builds strong business relationship with customers

Sell Through Dialogue

4. Masters disease area product knowledge

5. Prepares for each call

6. Engages each customer in a dialogue about products

7. Gains the best possible commitment on every call

Keep Adding Value

8. Continually adds value to the customer

9. Demonstrates initiative, passion and persistence to get results

APPENDIX O — E-MAIL FROM CHRISTOPHER TO J. NASH ET AL. (CHRISTOPHER DEP. EX. 10)

Michael S Christopher/RTP/PSF/GSK

05/30/003 10:13 PM

To Jeffrey S Nash/RTP/PSF/GSK@SB, David X Scull/RTPIPSF/GSK@SB, Alisha L Ritz/RTP/PSF/GSK@SB, Melody S Wagner/RTPIPSF/GSK@SB, Sandra K Briggs/RTP/PSF/GSK@SB, Susan X Hodges/RTP/PSF/GSK@SB

cc

bcc

Subject The Beginning

Hello, I just wanted to say "Thank you" to each and everyone of you for the effort that you have made to make me feel like a HUGE part of the TEAM. I feel as if I have been working with you for years, and that .feeling is wonderful. I have thoroughly enjoyed my very 1st week working with "The Greatest Sales Team in America." I have been waiting anxiously for this week and now that it is here, l expect to make a positive impact on our goal, our market share, our strategies, and our overall focus.......Making Doctors feel confident in prescribing GSK's Products. Enough of the soft hearted stuff. I hope everyone has a wonderful weekend and I will see ya next week.

MSC

APPENDIX P — CHRISTOPHER REGIONAL DEVELOPMENT PROGRAM APPLICATION (CHRISTOPHER DEP. EX. 12) DATED MARCH 29, 2007

CHRISTOPHER REGIONAL DEVELOPMENT PROGRAM APPLICATION (CHRISTOPHER DEP. EX. 12)

From: Michael S Christopher/RTP/PSF/GSK [Michael.S.Christopher@gsk.com]
To: Joseph M Golson-Ill/RTP/PSF/GSK@GSK
CC:
BCC:
Date Sent: 3/29/2007 2:51:30 PM
Subject: T2D RDP
Attachment Names Size (Kb) Document Type
01_ T2D _RDP _Application.doc 55296 Document

Joe,

Disregard my first email....this is the correct RDP application.

Thanks

Shane Christopher
Desert Mountain Region
Senior Pharmaceutical Sales Rep
480 370 2791
GSK VM: 91768

Regional Development Program (RDP) **Application**

Appendix P

SELECTION CRITERIA:

1- Minimum of 2 years pharmaceutical experience (1 year with GSK)

2- Grade S09 or higher

3- Sales Performance (Achieved Product Sales Goals and in top 50% of Region for 2 years)

4- Rated at Proficient in an Sales Representative Winning Practices

5- Consistent demonstration of the attributes included in this application

Please note that your overall performance will be included as a deciding factor when the decisions are made to invite each individual in the Regional Development Program- *your RVP has final selection discretion.* You will also be required to maintain your sales in the top 50% of the U.S. while in the Regional Development Program- measured every 6 months. Successful completion of the Regional Development Program does not guarantee future career advancement.

Name: Michael Shane Christopher	Territory Number: T2DHL 1
Job Title: Senior Pharma Rep	Manager's Name: Joe Golson III

Appendix P

Grade: S09	GSK Hire Date: March 31, 2003

1. Summarize your sales goal achievement over the previous 8 Quarters. Explain any variances from the criteria if applicable. Attach relevant Insight Quarterly and Bonus Summary sheets. Comment on any National/ Regional/District Sales Awards. Place an 'X' in one of the boxes below and explain if you have not accomplished sales goal achievement over the previous 8 quarters.

Ruby Tier Award 2004

Dec 2006	105.7%
Aug 2006	142.5%
May 2006	66.9% (I transferred and cross trained on current products after 1/3 of the quarter)
Feb 2006	110%
Nov 2006	150.0%

	Top 50% in Region for last 8 quarters
X	Top 50% in Region for last 7 of 8 quarters (I only have data to support the last 5 quarters)
	Not in Top 50% in Region for 2 or more quarters

Explain if you have not accomplished sales goal achievement over the previous 8 Quarters:

Appendix P

2- Currently rated proficient or expert on all sales representative Winning Practices.

Denote the appropriate box below.

X	Minimum of Proficient in all 9 Winning Practices
	Not Proficient in all 9 Winning Practices. Explain;

Attributes

Below are attributes included in the selection criteria for participation in the Regional Development Program. Please read the definition and performance descriptors for each attribute. Once you are clear on the definition of the attribute, complete at minimum of 1 and a maximum of 3 "STAR"s describing examples of how you have demonstrated this attribute in your current job. A "STAR" describes the **situation or task** (ST) you worked on, the **action** (A) you took, and the ultimate **result** (R) of the action you took.

Appendix P

1- Self Development	Performance Descriptors:
Demonstrates initiative for self development; has achieved an appropriate level of technical knowledge and skills for the Job you are performing; keeps up with current developments and trends in your area of expertise. Actively identifies new areas for learning; regularly creates and takes advantage of learning opportunities; uses newly gained knowledge or skill on the job and learning through the application of the new knowledge or skill.	• **Maximizes development.** Identifies and actively participates in appropriate developmental activities (i.e. project assignments, self-study, a-learning, training workshops) that help fulfill learning needs and makes the most of the learning experience. • **Applies knowledge or skill.** Puts new knowledge, understanding or skill to practical use on the job; furthers learning through application on the job. • **Has skills/knowledge.** Possesses relevant knowledge and skills to perform effectively on the Job. • **Develops skills/knowledge.** Develops new knowledge and skills by keeping abreast of the changing trends in the job and proactively seeking out ways to develop the new skills or knowledge required to do the job effectively.

Appendix P

Situation/Task	Action	Result
I transferred over from the Philly side of the business and cross-trained on Advair, WXL, and Boniva. Because cross-training wasn't as thorough as initial training, I didn't feel I received enough training.	I wanted more training. I went into the e-force modules and learned more about my products to have a better understanding and insight into the respective disease states.	As a result, I have been able to communicate with more dialogue with my customers.

Appendix P

2- **Building Working Relationship/Teamwork**	**Performance Descriptors:**
Develops and uses collaborative relationships to facilitate the accomplishment of work goals and objectives, Relates well to all people in the organization. Projects a positive "can-do" attitude in support of organization goals and objectives. Actively participates as a member of the district to help the district team move toward the completion of goals.	. **Seeks Opportunities.** Proactively tries to build effective working relationships with other people. . **Develops ideas,** Seeks and expands on original ideas, enhances other's ideas and contributes their own ideas whenever appropriate. . **Support Goal accomplishment.** Actively contributes ideas and suggestions during meetings and teleconferences, completes all agreed actions, supports other district members and ultimately supports the accomplishment of all the district goals. . **Facilitates Agreement.** Gains agreement from others to support ideas or take action; uses sound rationale to explain the value of action.

Appendix P

Situation/Task	Action	Result
When I transferred into the territory, there were some challenges with routing, communication, and teamwork. I didn't want to come into the territory with an attitude of having things done my way or to act as if I knew the solutions to the current issues. I waited patiently and learned as much as I could about the territory, the team, and way communication barriers were present.	It took a few months to actually make a few rotations within the field and to also get to know my teammates. My plan was to lead by example and to communicate with each of my teammates as a resource, By demonstrating an optimistic approach to the business and the ability to face adversity within the team, I eventually proved my methods were effective in reaching goals and to have open communication.	As a result, our current team has excellent communication and we function well. We rely on each other for support and utilization of each other's strengths. We have been able to grow the business in unforeseen areas.

3- Please comment on any additional National/Regional/ District responsibilities you have had.

I had the opportunity to represent GSK and participate in the Indianapolis Black/Minority conference in 2005 (National Conference). I attended the conference with the capacity to educate and inform participants of disease states and GSK products. I have been point person on product and TST meetings for routing, programs, manage care issues and 1-on-1 dinners. I have facilitated product discussions/presentations for our District in the New Frontier Region (Jeff Nash-DSM).

I also had the privilege to attend and represent GSK at a regional Heart Failure Clinic for Coreg. I attended the clinic with one of our high OF/volume offices. We learned a lot about how HF clinics are run and how effective the clinic is for patients suffering from HF. My attendance made a huge impact on my business not only with this office but with many other offices.

4- Describe your three greatest strengths you bring to your current role?

I have the ability to build strong relationships personally and professionally. I have formed many different relationships within the territories that I have worked in. Some of those relationships have been personal and have also improved my business.

I am very enthusiastic about my work and GSK. I enjoy the environment that I am in everyday. I know that I work for one of the strongest companies in the world and the company gives back to its employees.

I am an achiever, I make things happen. When I set goals or even when goals are set for me, I achieve them. I do the work it takes to ensure that the goals are first achievable and then set a timeline.

5- What attributes would you like to develop to improve your performance? Explain.

I would like to gain a broader perspective of the pharmaceutical industry. I would like to learn from the strengths of other individuals and how they are successful. I want constructive criticism on how I can further improve my strengths. I want to learn how to manage people.

6- Complete a brief personal statement on your career aspirations, your motivations for participation in the Regional Development Program and why you should be considered.

My career aspirations include but aren't limited to MCRITSR, Associate Recruiter, Recruiting Acct Manager, Field Sales Trainer, Manager, Regional Analyst.

I am motivated to participate in the RDP because it will allow me to get great feedback on my strengths and weaknesses. It will also allow me to be introduced to different roles within the company and the responsibilities that each position is held accountable too.

I should be considered because I have excelled within two different regions on both sides of the business. I have a Ruby Tier award for my efforts and results in 2004. I transferred to the T2D region in April 2006 and

I am currently ranked 7 of 22 through the 3rd quarter. I finished the 4th quarter with a portfolio achievement of 105.7%. I haven't received the final WC rankings report however, I am extremely proud of this accomplishment considering I moved into the region after one full quarter and have the ranking that I have. I have the potential of winning a tier award this year with my results.

7- Field Sales Manager's comments on Pharmaceutical Representative's application *(please return the completed application to the DSM Champion)*:

APPENDIX Q — E-MAIL FROM CHRISTOPHER TO J. NASH (CHRISTOPHER DEP. EX. 18)

Michael S Christopher/RTP/PSF/GSK

01/12/2004 11:27 PM

To Jeffrey S Nash/RTP/PSF/GSK@SB

cc

bcc

Subject work contact 1/12

Jeff:

I wanted to thank you again for today's work contact. I felt like today was really a big help in that we are now on track for a successful year. Now that I have had an opportunity to be in the field for about 8 months, I have had a chance to see how the business is ran, sorta. Now it's just a matter of targeting the right message to the right people. Looking at the data and seeing where to gain business, where to initiate business, and where to steal business. With the me beside the team, and your help leading us......WE should be the next big thing this year. Looking at the team that we currently have, you have done a remarkable job at tailoring a diverse group of people with each of us complimenting one another. As the first hire for you as a manager, I want you to shape me to be a leader within this team, within this industry, and specifically in this company, Enough of the sentimental

stuff, Thanks again for allowing me to maintain focus and keeping me on track with the TEAM APPROACH.

“.......By any means necessary” Malcolm X

Shane C

APPENDIX R — FIELD COACHING TOOL (CHRISTOPHER DEP. EX. 25)

FIELD COACHING TOOL
(Christopher Dep. Ex. 25)

PHARMA SALES REP: CHRISTOPHER, MICHAEL (T2DHL1)

DISTRICT SALES MGR: GOLSON, JOSEPH

Territory: T2DHL1

Date of Creation: 02/20/2007

Date(s)/Area Worked: February 19 & March 8, 2007 – N Phoenix

KEY SALES METRICS Review and provide your feedback below.

Coaching Feedback
InSight Monthly, December 2006 (4 month Fall Qtr) Boniva: Share Rank 18/24, Share Chg Rank 19/24. Advair: Share Chg Rank 8/24, % Vol Chg Rank 11/24. WXL: Share Rank 10/24, Share Chg Rank 10/24. Monthly Activity & Time Report, December 2006 TYD Prescriber Calls/Day Avg 8.27, Prescriber Total Details/Call Avg 1.72, Retail Pharmacy Calls/Day 0.61. Daily call averages expectations are: Prescriber Calls/Day Avg 9, Prescriber Total Details/Call Avg 2, Retail Pharmacy Calls/Day Avg 3. All call averages for the year were below expectations for the year, most notably Retail Pharmacy Calls/Day. All call averages are expected to achieve expectations in 2007.

Appendix R

SALES CALL OBJECTIVES How effectively were today's sales call objectives met?

Coaching Feedback
Generally Shane was able to meet his call objectives. The area for development in this area is for Shane to thoroughly analyze a customer's overall situation (patient demographics, prescribing habits, beliefs about the therapeutic treatment options, commercial managed care, AHCCCS, and managed Medicare part d) and set a call objective to address the most compelling need of that customer. General call objectives (sell the efficacy of…, the great MCO coverage of…, the safety of...) will move market share so far and then plateau. Setting call objectives that address the customer's specific need will perpetuate market share growth.

Appendix R

Were the following areas affectively addressed?

	Frequently	**Occasionally**	**Seldom**
When the customer(s) should use his/ her brand(s)	X		
Why the customer(s) should use his/ her brand(s)? Did you deliver the core message each product detailed?	X		
How the customer(s) use his/her brand	X		
Coaching Feedback	**Shane effectively addressed when, why, and how during all sales calls**		

Were the following Sales Tactics effectively addressed?

***

[Table omitted]

Appendix R

GSK Sales Call Model Provide specific examples/ observations of:

Steps in the Sales Call Model	Areas of Strength	Areas of Development
Pre-Call Planning: Reviewing and analyzing customer profiles, Setting SMART sales call objectives, Organizing sales calls to maximize results	Shane did a thorough review of each customer's prescribing history and the target flag associated with the customer. During his call on the office of Drs. Rink & Sink Shane remembered that they were Boniva IV targets. He asked appropriate questions, provided the appropriate information, and asked for the business. He pursued his objective.	A written daily call plan is expected. The plan should include the customer's name, a brief prescribing history, and a clear SMART objective to accomplish during the call. The written call plan should be presented to me at the beginning of each work trip day.

Appendix R

Opening/ Rapport: Building a relationship with the Total Practice, Gaining customer interest through an engaging opening statement, Transitioning from a general dialogue to painting a patient picture.	Shane realizes the importance of brevity to his customers. He greets them cordially, gets right to business with a visual and a statement or question, and gets the customer's feedback. Shane uses his time efficiently with the customer and they appreciate him understanding their need.	

Uncovering Needs: Asking insightful questions, active listening.	Shane used questions to gain an understanding of the customer's need and to uncover opportunities. He asked Dr. Ahmad about his patients suffering GI problems with the weekly meds to uncover an area of opportunity. Shane discovered in Dr. Skelley's office that if efficacy and safety are equal, they select the product with the most favorable formulary status.	With customers who are difficult to get to talk, try asking open ended questions and waiting until they answer. Ask their opinion or thoughts about a subject or piece of information. Ask them to explain more about a statement they just made.

Appendix R

Positioning Brand Benefits: Link features and benefits, deliver key selling messages, core message and feature/benefit statements that support the core message.		
Closing/ Bridging: Recognizing buying signals, asking for a commitment, introducing (or bridging to) 2nd position brand.	Good close with Dr. Ahmad asking him to prescribe Boniva for new patients and for patients wanting more convenient dosing or lessened GI side effects.	

Post-Call Analysis: Updating customer profile, conducting self-evaluation, following upon promises.		Make note of the offices where they say that formulary coverage is a key component of their prescribing decision. Plan how you will address the objection to the higher tier status of Boniva compared to that of Fosamax and/or Actonel.

Appendix R

Answering Questions and Concerns: Using the APACT process (Acknowledge, *probe*, *answer*, confirm, and transition) for addressing questions and concerns; using the MILD framework (Misconceptions, Indifference, Limitations, Doubts) to answer questions and concern.		

Select up to 3 **Winning Practices** for focus and record *the demonstrated behavior.*

***

[table omitted]

Appendix R

Coaching Feedback
Shane owns the Boniva business in the territory. He has segmented his targets into 3 groups: 1) those with high market volume, high Boniva market share, and growing market share change; 2) those with medium to high market volume, medium Boniva market share, and slow or declining market share growth; and 3) those with low market volume with low growth potential. He is spending his selling time with groups 1 & 2 where there is the grates potential for Boniva market share growth, Shane is leveraging his relationships with customers in his territory by helping his colleagues get quality time with key customers (helping Debbie Hunter get more time at a dinner with Drs. Jorgensen & Gassner). He has leveraged his relationship with Dr. Feldman to bring him from prescribing "zero" Boniva to now prescribing 1 or 2 per month. Shane is proficient at call planning. As mentioned above he should set a call objective that is specific to the customer's need.

***

[tables omitted]

Sales Representative Comment
I have asked Joe to get back to me with information about the RDP. He has sent me the application to fill in and I will be returning that to him within a week. I am looking for this opportunity of professional growth within this program. Joe and I are working together to compile all of the required criteria for my Executive Level promotion. I will commit to participate in the eforce modules to further educate myself on Imitrex RT technology in addition to asking my counterparts for help with high prescribers as needed. I intend to schedule a Boniva program for the Scottsdale area within a month with the approval of our regional/ national speaker.

APPENDIX S — EXCERPTS FROM GSK EMPLOYMENT APPLICATION (DEF. EX. C - BUCHANAN DEP. EX. 6)

Excerpts from GSK Employment Application (Def. Ex. C - Buchanan Dep. Ex. 6)

Employment Application

Date 08/07/2003

Please complete application in detail. Incomplete information may cause delay in processing and adversely impact your consideration for employment

Print Name (Last) Buchanan	First Frank	Middle Thomas	Former

Present Address (Street or RFD) 1333 W. Guadalupe Rd. #1813	City Gilbert	State Arizona	Zip Code 85233	Phone number 4806326050

Social Security Number REDACTED	E-mail Address Frank@1clearvoice.net

Appendix S

Position Desired Sales Representative	_X_ Regular Employment ___Temporary	Date Available 08/07/2003

If you need assistance in completing the employment application, please contact your recruiter. MFDV an equal opportunity/affirmative action employer.

GSK provides equal employment opportunities to all employees and qualified applicants for employment without regard to race, color, religion, sex, national origin, age, disability, marital status, disabled veteran, or any protected characteristic set forth by local, state, and federal Fair Employment Practices Statutes.

Personal History

Please indicate resident addresses for three (3) years preceding the date of application. If more space is needed, use an additional sheet of paper.

Previous Address (Street or RFD)	(City)	(State)	(Zip Code)	(Phone Number)
2485 E. Jasper Dr.	Gilbert	Arizona	85296	

Appendix S

Previous Address (Street or RFD)	(City)	(State)	(Zip Code)	(Phone Number)

The policy of GlaxoSmith-Kline is to hire only United States Citizens, U.S. permanent residents, and aliens lawfully authorized to work in the United States. All new employees will be required to complete the INS form I-9.	Are you legally authorized to work in the US?	X Yes __ No	Will you now or at some time in the future require sponsorship for an employment visa status (for example, H-1 visa status)?	___ Yes X No

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Are you over the minimum legal age of at least eighteen?	X Yes __ No	Do you have any relatives who work at Glaxo Smith Kline?	___ Yes X No	If yes, who/ relationship?

Have you ever been employed by GlaxoSmithKline or any of its affiliates?	___ Yes X No	If yes, when?	If yes, please list the company name and location.

Are you willing to relocate?	X Yes __ No	Are you willing to travel?	X Yes __ No	Who referred you to Glaxo-Smith Kline? Website	Salary desired $80k

Appendix S

Have you ever been convicted of a crime, excluding traffic violations? (Conviction will not necessarily disqualify the applicant from the position applied for.)	___ Yes X No	If yes, where?	When?	Charge?	Disposition of Case

Education	If you graduated in the past two years, please indicate your grade point average compared to maximum possible grade. Example: 3.2/4.0	Grade Pt. Yours	Avg. Max	

High School Address Dobson High School 1501 W. Guadalupe Rd. Mesa, Arizona	Graduated GED (Y/N) Y	Concentration of Study High School Diploma	3.2	4.0
College or University Address Northern Arizona University Huffer Lane Flagstaff, Arizona	Graduated Y	Degree (Major/ Minor) Bachelor of Science – Physical Science	2.82	4.0
College or University Address Mesa Community College 1833 W. Southern Ave. Mesa, Arizona	Graduated N	Degree (Major/ Minor) Associate of Science – general	3.2	4.0

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Graduate School Address Arizona State University 32 Arizona State University Tempe, Arizona	Graduated N	Degree and nature of graduate research Master of Science – Clinical Nutrition	3.5	4.0
Graduate School Address	Graduated	Degree and nature of graduate research		

Additional Education ___Vocational ___Business ___Correspondence ___Trade ___Other Name of School: _______________	Degree or Certificate	Course Taken		

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List any licences / certifications such as registered pharmacist or certified public accountant	First Date Obtained	Last Date Valid

Employment Record

Starting with your present or most recent position, list all places of employment including military experience and account for employment during the ten (10) year period preceding the date of application to include periods of unemployment. Please list current contact information for each position listed below. If more space is needed, use an additional sheet of paper.

Please complete in full even if resume is attached or the employer is no longer in business

---

[TABLE REFORMATTED]

Name of Present or Most Recent Employer
Qwest Communications
Address: 20 E. Thomas Rd. City, State, Zip Phoenix, Arizona 85044
Phone Number: 8003672884

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Your Position Title
Customer relations manager

Date Employed
From 09 2001 To 06 2003
[ ] Current

Name of Supervisor
Patrick Lewis
Supervisor's Title
Team Leader

Hours/Week
40

Present Salary
$55k

Date of Last Increase
02/03

Starting Salary
$45k

Amount of Bonus
$40k

Date of Last Bonus
08/02/03

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Describe your responsibilities

- Promote and sell complex telecommunication products and services by consulting, gathering and evaluating data
- Manage multiple Product Agent Programs totaling more than 300 agents
- Directly responsible for achieving department revenue success
- Process and analyze department data to interpret success
- Respond to customers' inquiries, requests through telephone, use judgment to make adjustments to customers' accounts and notify customers of dispute or inquiry resolution
- Explain and/or demonstrate all services, products, features and costs
- Negotiate customers' requests for installation, removal/changes of service, billing arrangements and coordinate installation with other departments
- Use various computer systems/graphical interface systems to simultaneously to process service orders

Reasons for Leaving or Wanting to Leave

Appendix S

[TABLE REFORMATTED]

Name of Present or Most Recent Employer

Radiant Research

Address:
407 W. Osborn Rd.
City, State, Zip
Phoenix, Arizona 85013

Phone Number:
6022779256

Your Position Title
Clinical Research

Date Employed
From 09 2000 To 04 2001
[ ] Current

Name of Supervisor
Karen Kozlowski
Supervisor's Title
Clinical Director

Hours/Week
40

Present Salary
$36k

Date of Last Increase
09/00

Starting Salary
$36k

Amount of Bonus
0

Date of Last Bonus
Na

Describe your responsibilities

- Executed marketing and sales programming to potential physicians
- Directly supervised clinical team of coordinators and physicians
- Responsible for completion of new business development
- Coordinate affiliate physician accounts payable
- Coordinate facility management i.e.: service contracts, repair, installation

Reasons for Leaving or Wanting to Leave

Appendix S

[TABLE REFORMATTED]

Name of Present or Most Recent Employer

Protocare Research

Address:
6707 N. 19th Ave.
City, State, Zip
Phoenix, Arizona 85015

Phone Number:
602 246 1965

Your Position Title
Clinical Research

Date Employed
From 10 1999 To 07 2000
[ ] Current

Name of Supervisor
Julie Peach
Supervisor's Title
Clinical Director

Hours/Week
Present Salary
Date of Last Increase
Starting Salary
Amount of Bonus
Date of Last Bonus

Describe your responsibilities
Reasons for Leaving or Wanting to Leave
***Note: Protocare Research and Radiant Research have merged into one company…this may get create challenges for you.

[TABLE REFORMATTED]

Name of Present or Most Recent Employer
MDS Pharma
Address: 4639 S. 36th St City, State, Zip Phoenix, Arizona 85040
Phone Number: 602 437-0097

Appendix S

Your Position Title
Clinical Research

Date Employed
From 07 1998 To 10 1999
[ ] Current

Name of Supervisor
Kelly Grogan
Supervisor's Title
Clinical Director

Hours/Week

Present Salary

Date of Last Increase

Starting Salary

Amount of Bonus

Date of Last Bonus

Describe your responsibilities

Reasons for Leaving or Wanting to Leave

Appendix S

[TABLE REFORMATTED]

Name of Present or Most Recent Employer

Valley of the Sun YMCA

Address:
350 N. 1st Ave
City, State, Zip
Phoenix, Arizona 85003

Phone Number:
602 307-5337

Your Position Title
Program Director

Date Employed
From 12 1991 To 07 1998
[ ] Current

Name of Supervisor
Jeff Gazerdo
Supervisor's Title
Executive Director

Hours/Week

Present Salary

Date of Last Increase

Starting Salary

Amount of Bonus

Date of Last Bonus

Describe your responsibilities

Reasons for Leaving or Wanting to Leave

APPENDIX T — WINNING PRACTICES - FOR SALES REPRESENTATIVES

"Winning Practices"

(Def. Ex. C, Buchanan Dep. Ex. 14)

Winning Practices – For Sales Representatives

1. Own the Territory Business
   - Analyze what is happening in the territory and understand why
   - Plan what each team member will do to drive superior sales for each promoted product
   - Execute your team's territory plan flawlessly, monitor progress, and adjust to ensure success
2. Work as a Team to Drive Results
   - Commit with passion and persistence to achieve team goals
   - Assign team roles with clear individual accountabilities
   - Collaborate to deliver seamless selling and service

3. Master Professional Knowledge

    - Develop the expert product knowledge that your customers need

    - Understand the clinical management of your customers' patient types

    - Understand how the business of medicine affects your customers' prescribing habits and their patients

4. Plan Every Call

    - Gain insight into your customers and how to influence them

    - Set specific objectives for advancing the customer up the Brand Bonding Ladder

    - Organize the sales call to maximize your selling time and results

5. Sell Through Customer-Focused Dialogue

    - Create interest, uncover the customers' need and effectively position the brand

    - Confidently deliver the right selling message and create dialogue with compelling content and resources

- Effectively address the customers' questions and concerns

6. Get the Best Possible Commitment on Every Call

   - Ask for the business

   - Sell the entire portfolio

   - Communicate the next steps with your team

7. Provide Added Value to the Customer Relationship

   - Provide exceptional customer service to the total office

   - Use GSK resources to create value for the customer and business impact for the company

   - Strategically utilize programs to build customer advocacy for GSK brands

WINNING PRACTICES DRIVE SUPERIOR SALES PERFORMANCE

Winning Practices are the skills, knowledge and behaviors demonstrated by GSK's most successful sales representatives and managers

PROFICIENCY LEVELS PROVIDE A DISCIPLINED APPROACH

Appendix T

Winning Practices are described at three progressive levels of proficiency

PRE-FOUNDATIONAL	FOUNDATIONAL	PROFICIENT	EXPERT
Still learning the basics	Basic performance	Strong performance	Superior performance

- **Expert:** the behaviors that differentiate truly superior performers from everyone else

- **Proficient:** the determinants of strong performance in a role

- **Foundational:** the fundamentals of basic performance in a role

- **Pre-Foundational:** still learning the basics of the role

WINNING PRACTICE AND PERFORMANCES RAISE THE PERFORMANCE BAR

GSK's high performers strive to become expert in every Winning Practice. Most people in a new role begin at the foundational level. High performers progress quickly to the expert level with their managers taking every opportunity to accelerate their growth. Winning Practices help create the greatest sales team in America, and make GSK the undisputed industry leader.

Appendix T

1. OWN THE TERRITORY BUSINESS

	FOUNDATIONAL	PROFICIENT	EXPERT
Analyze Analyze what is happening in the territory and understand why	Analyze the full spectrum of available territory data and track progress toward goals Discuss with your team and sales manager what is happening in your territory	Accurately identify customer trends and opportunities within the territory using the available company reports Help your Territory Selling Team prioritize customers based on Optimal frequency and market volume, along with insight into their local market potential	Gain competitive advantage by anticipating opportunities and challenges, interpreting the latest results for others and leading team action to grow the business Discern the activity of the competition in the local marketplace and what the team needs to do to be effective

Appendix T

Plan Plan what each team member will do to drive superior sales for each sponsored project	Help your team create territory business plans for each product Create a Terrority Selling Team Roadmap (routing plan) that emphasizes making the right number of calls on the right customers and delivering the right messages Create a personal development plan with your manager's input and keep him/her updated on your actions and process	Provide team leadership in developing specific plans for your major brands (with clear action steps, accountabilities and timelines) that will move customers up the Brand Bonding Ladder and drive sales Determine how to effectively implement company initiatives and utilize resources (within guidelines) Create an efficient Territory Selling Team Roadmap (routing plan) for maximum coverage of customers by optimal frequency, including the expected calls on pharmacies	Lead team efforts to optimize resource allocation, optimize routing and create dynamic business plans that drive business success each quarter Contribute to district and/or regional business planning efforts

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Execute Execute your team's territory plan flawlessly, monitor progress, and adjust to ensure success	Adhere strictly to GSK Commerical Policies and Practices Reliably follow through on your commitments to implement the Territory Selling Team plan and Roadmap (routing plan) Meet deadlines and stay within the allocated budget Track your progress toward goals and know exactly where you stand	Accurately interpret negative variance from goals and help the team quickly adjust plans to be successful Meet quarterly goals for portfolio sales and call activity Consistently exceed the quarterly national goals	Consistently take initiative to solve problems and capitalize on opportunities that arise when implementing your team plan Take a leadership role to ensure the team consistently meets or exceeds its quarterly goals for portfolio sales, call activity, and resource utilization (vouchers, sampling and customer focus budgets) Help the district and region successfully implement company programs

Appendix T

2. WORK AS A TEAM TO DRIVE RESULTS

	FOUNDATIONAL	PROFICIENT	EXPERT
Goals Commit with passion and persistence to achieve team goals	Set challenging performance and proficiency development goals each quarter Consistently demonstrate a positive attitude, persistence and the desire to learn from even the most difficult situations Adjust your work schedule to meet customer needs and achieve team goals	Commit to the team to do whatever it takes to achieve and exceed team goals (acting within guidelines) Persist in attempts to gain access to important customers, even difficult-to-see customers Always demonstrate the willingness to go above and beyond job requirements with customers, ensuring that their needs are met with passion and concern for their patients	Challenge the team to set stretch goals for sales performance and for the specific efforts that will be needed to achieve these goals Hold every team member including yourself accountable to act with urgency in building commitments and achieving goals When the approaches that have been tried before are not working, lead the team to take educated risks and try new (approved) tactics

Roles Assign team roles with clear individual accountabilities	Confirm with the team that you know exactly what you are accountable to do to implement every part of the territory business plan Offer to take on additional team roles to help your team be more successful	Make sure the team identifies which representative is taking the lead with each important customer, based on relationships and selling skills For your major products, take a leadership role in defining team members' individual roles with customers, keeping them up to date and ready to self	Take a leadership role in ensuring that every team member knows what they are individually accountable to do and are motivated to do so When assigning roles, help the team make the best use of the diverse individual strengths on the team

Reliance Collaborate to deliver seamless selling and service	Promptly share pertinent customer information with team members Meet regularly and enthusiastically with the team to review progress, contribute ideas and update plans When a conflict arises with another team member, address it immediately, professionally and directly Seek and implement development recommendations from mentors, managers and colleagues	Coordinate with team members and co-promote partners in achieve seamless customer service and a continuous selling dialogues Help organize and run regular, effective product team meetings Seek out and share best practices across the team, district and region	Foster collaboration with a wide range of internal partners and lead efforts with them to address important opportunities and challenges (other Territory Selling Team, Regional Medical Scientist, Managed Care, Govt. Affairs, etc.) Take a team leadership role in providing direction, establishing norms, solving problems, strengthening relationships and helping team members feel valued Routinely offer help, suggestions and coaching to other representatives to strengthen their performance

3. MASTER PROFESSIONAL KNOWLEDGE

	FOUNDATIONAL	PROFICIENT	EXPERT
Products Develop the expert product knowledge	Use proper vocabulary to express the mechanisms of action, pharmacology, indication, efficacy, tolerability, cost, dosage and administration of promoted products Express confidence in and passion for your promoted products Pass all GSK product certification examinations	Credibly discuss the features and benefits of your promoted products in appropriate patient types using approved selling materials Present clinical data clearly and concisely, using evidence based medicine in discuss the statistical and clinical relevance of approved studies with customers Using a thorough knowledge of approved proof sources, fairly contrast your product with the competition to identify appropriate patient types for your product	Become an expert in the eyes of your customer due to your mastery of your products, those of your competitor, and your ability to provide customers with the credible information they need in a timely manner Lead team and district efforts to improve the product learned edge of other representatives

Therapeutic Areas Understand the clinical management of your customers' patient types	Understand, appropriately use and correctly pronounce disease vocabulary and other medical terms with customers Maintain an easily accessible resource guide with all approved clinicals for promoted products	Understand how the diseases are diagnosed and managed, describe the related anatomy, physiology, disease epidemiology, symptoms, diagnosis and testing Understand and discuss the significance of adverse events, the impact on physicians and patients, and the interventions required to address side effects	Understand the selling implications of significant clinical studies and emerging trends on the therapeutic area and use these insights to help the team position the brand with customers Understand and discuss how the range of available treatment options relates to GSK products

Customers' Business Understand how the business of medicine affects your customers' prescribing habits and their patients	Know the formulatory status of your promoted products and those of the competition, throughout your territory for your top managed care plans, top Medicare D plans and Medicaid	For each customer understand the formulatory issues that are associated with using one promoted product over another, and use this understanding to create advantage for GSK products Understand and discuss the cost-effectiveness and quality-of-life benefits our products provide Understand the clinical practice issues of importance to the customer	Gain customer respect by being well-versed in health care industry issues and being able to discuss the implications for the customer's practice When our product is formulary disadvantaged, gain optimal usage through cost/benefit analyses for appropriate patients

Appendix T

4. PLAN EVERY CALL

	FOUNDATIONAL	PROFICIENT	EXPERT
Gain Insight Gain insight into your customers and bow to influence them	Know the best time to see the customers and schedule activities (appointments, programs, etc.) as necessary in …	Plan your call based on a solid grasp of When, Why, and How a customer prescribes different medications for different his/her patient types	Knows which information, people, resources and formulary factors most influence each customer's prescribing decisions and plan how to leverage these
	Know the dynamics of the customer's practice—the customer's specific disease state increases, most commonly seen patient types and preferred treatment approaches	Know what is holding your customer back from making more use of your promoted products in appropriate patient types	Know your customers' latest prescribing trends and use this insight to tailor the selling approach to drive sales
	Accurately place the customer on the Brand Bonding Ladder, based on an analysis of past calls and the most recent proscribing trends	Understand the impact of boundaries on the customer's patients and prescribing habits and use this to create a plan for increased GSK product use for appropriate patients	Show awareness of multicultural and other individual differences among your customers and adapt selling approaches to reflect these

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Set Objectives Set specific objectives for advancing the customer up the Brand Bonding Ladder	Make specific pre-call objectives for each customer aligned with the brand strategy that will move the customer along to the next state of the Brand Bonding Ladder for each brand	Determine how to build continuity from previous sales calls with insight from colleagues regarding what has been working *Know exactly what ac*tions and commitments you want from your customer for each of your promoted products	Coordinate an effective multi-step *selling* approach with the team to move customers up the Brand Bonding Ladder with appropriate selling objective, selling materials, resource utilization and next stop commitments Devise coordinate call strategies with your team that make it easier for the entire team to gain repeated access

Organize Organize the sales call to maximize your selling time and results	Determine the optimal number of samples and/or workers to be left in each office based on your team's selling strategy Decide which approved sales calls to utilize with each customer and how you will use them to support your selling objectives Organize each day for the best selling opportunities—seeing customers in a logical and productive sequence	Determine how you will bring you calls to life with an engaging opening statement and insightful questions Prepare how will you position brand features and benefits, identify appropriate patient types engage the customer in dialogue and ask for commitment with each customer based on the brand strategy anticipate the information and needs of the customer and have them on hand	Prepare so well that you can adjust your selling approach and respond effectively to whatever the customer says during the calls

5. SELL THROUGH CUSTOMER-FOCUSED DIALOGUE

	FOUNDATIONAL	PROFICIENT	EXPERT
Position the Brand Create interest, uncover the customer's need and effectively position the brand	Link the previous call to the current one Effectively transitions from social conversation to meeting clinical needs with promoted products Probe to uncover When, Why, and How the customer prescribes for each disease state Express passion for helping customers help their patients	Incorporate team members' previous calls to create a continuous selling dialogue with the customer Probe with effective drill down questions until customer's positioning of our brand and the competition is well endorsed Maximize long-term impact by adjusting the timing and approach of the sales call based on an accurate read of the office climate, customer receptivity and situational opportunity	Completely understand what informs and motivates customers' prescribing decisions and use this to create customer interest and effectively position the brand on every call Consistently uncover customer needs and opportunities with insightful questions and active listening Maximize each selling opportunity by adjusting and setting approach based on what the customer needs and says

Deliver the Message Confidently deliver the message and create dialogue with compelling content and resources	Communicate the core selling messages for each promoted product, clearly, concisely, credibly and passionately. Match the brand message(s) with a detail aid or approved [illegible word] to the customer's position on the Brand Bonding Ladder Gain customer respect by providing only accurate and balanced information about promoted products with CPP guidelines	Routinely create two-way customer-focused dialogue on at least one elective topic: approved comparative data, dosing, efficacy, patient profile, customer cost, and/or safety/tolerability Routinely utilize a detail aid and an approved reprint to foster dialogue and recall	Routinely create two-way customer-focused dialogue on multiple effective topics that are of particular interest to the customer: comparative data, dosing, efficacy, patient profile, customer cost, and/or safety/tolerability Make high-impact group presentations

Address Questions Effectively address the customer's questions and concerns	Understand how to establish credibility by saying, "I don't know" and then follow up with urgency to ensure the customer's question or concern is adequately addressed Refer customers to appropriate information resources if dialogue shifts to off-label topics	Use "temperature checks" throughout the call to elicit underlying questions and concerns Effectively address customers questions and concerns using APACT, before seeking customer commitments	Swiftly and adeptly handle customer questions and concerns Ask insightful questions during the call to generate new customer insights, create extended product dialogue and/or refocus the call

6. GET THE BEST POSSIBLE COMMITMENT ON EVERY CALL

	FOUNDATIONAL	PROFICIENT	EXPERT
Ask Ask for the business	Recognize buying signals (such as information seeking, compliments, eye contact, reaching for information) and attempt trial close Summarize When Why and How to use the brand Ask directly for the commitment identified in your pre-call plan	Summarize When Why and How to use the brand, focused on satisfying customer needs identified during the sales call If the customer does not commit, probe further to understand the objection, attempt to overcome it and [illegible word] again Leave the office with tangible "next step" commitments from customers and their staff that increase the impact of the next call	Adjust the timing and nature of the commitment request based on an accurate read of the customer's buying signals Consistently earn the right to ask for the business because you have met the customer's needs Consistently obtain the maximum appropriate commitment that will move customers up the Brand Bonding Ladder and ultimately position our product, not the competitor's, for all appropriate patients

Appendix T

Portfolio Sell the entire portfolio	Transition to the next product in your portfolio and, at a minimum, deliver the core message Confirm the commitment(s) that you and the customer have made	Engage the customer with an effective transition to the next product Set up the call by obtaining an appointment or agreement to follow-up with the customer regarding your selling objective	Expertly sell the entire portfolio during the sales call by engaging your customer in a dialogue for all 2 or 3 products, closing (or trial closing) for all products and setting up your next call to drive the selling continuum pave the way for other team members so customers want to see them
Communicate Communicate next steps with your team	After the call, promptly communicate customer commitments and other pertinent information to your [illegible word] selling team	Critique each sales call to determine if pre-call objectives were met and to specify ways you and your team can improve future calls Provide useful customer insights to help team members improve their future calls	Lead team members in periodic reviews of the team's impact in moving key customers up the Brand Bonding Ladder Provide useful insights and feedback to sales management about current brand strategies and sales aids

Appendix T

7. PROVIDE ADDED VALUE TO THE CUSTOMER RELATIONSHIP

	FOUNDATIONAL	PROFICIENT	EXPERT
Total Office Provide exceptional customer service to the total office	Maintain updated information about each customer office (names, roles, best times, etc.) Make brief, well-times sales calls that respect physician and staff time, office policies and etiquette. Follow through to ensure that commitments to customers are being met. Build rapport with the customer's staff.	Consistently use the "total office call" to learn about the needs and customer satisfaction of prescribers, gatekeeprs and influences. Respond with appropriate urgency to customer (and office staff) requests and concerns. Passionately sell the value that you are bringing to the office and their patients.	Present the GSK brand, vision and services to all health care professionals so that customers see GSK as the industry leader facilitate the networking of health care professionals in your area

Appendix T

Resources Use GSK resources to create value for the customers and business impact for the company	Provide customers with the appropriate samples workers, patient education materials and other approved resources, to balance customer needs with business customers	Identify resources that genuinely interest the customer and position taken as valuable Keep the appropriate office staff informed about approved company resources that could benefit their patients	Partner with customers to help them meet professional objective (e.g. involvement in peer education or community culture where appropriate) Use insight into "key customers" professional interests to bring the right program, people, literature and other company resources of value to them (Regional Medical , Market Development Manager, etc.)

Appendix T

Programs Strategically utilize programs to build customer advocacy for GSK brands	Assist in the recruitment, organization, and proper administration of customer programs. Initiate programs (within guidelines) for office health care professionals and appropriate patient groups	Intelligently use programs and events to gain access, strengthen relationships and increase each customer's position on the Brand Bonding Ladder Organizes effective speaker programs, coordinating with other representatives to materialize selling of the entire portfolio Select the most appropriate customers for each program and prioritize their attendance	Develop thought leaders and speakers into GSK product advocated who communicate strong and passionate product messages identify and develop speakers and product advocated who have high potential identify and connect future possible researchers with the RMS/Medical Department

APPENDIX U — "WINNING PRACTICES" SELF-ASSESSMENT (DEF. EX. C., BUCHANAN DEP. EX. 15)

"WINNING PRACTICES" SELF-ASSESSMENT (DEF. EX. C., BUCHANAN DEP. EX. 15)

Frank T Buchanan/RTP/PSF/GSK

To Tom J Tyma/RTP/PSF/GSK

CC

BCC

Subject Re: Winning Practice Input – ACTION by January 15th 8525755550043E42A85257385005E6326

Tom,

Please let me know if you have any questions.

Thanks
Frank Buchanan
Senior Sales Representative
Glaxo Smith Kline
(602) 350-5171

***

Tom J. Tyma/RTP/PSF

Appendix U

To Deborah L Hunter/RTP/PSF/GSK@GSK,
Mari X Moga/PharmUS/GSK@GSK,
Kari A Yanes/RTP/PSF/GSK@GSK,
Kathryn M Bohlander/PharmUS/GSK@GSK,
Jessica V Barone/RTP/PSF/GSK@GSK,
Danielle D Gavin/PharmUS/GSK@GSK,
Lisa A Katz/RTP/PSF/GSK@GSK,
Cathy L Ainsworth/RTP/PSF/GSK@GSK,
Kevin D Ho/PharmUS/GSK@GSK

CC

Subject Winning Practice Input – ACTION by January 15th

T2DH, (*We really need a district name*)

In the first quarter, I will need to submit to Chris a baseline where everyone is with their Winning Practices. I will have feedback from your previous manager but I would also like your input as part of this process. Remember many of the criteria has changed to be pre-foundational, foundational proficient and expert.

Expert: the behaviors that differentiate truly superior performers from everyone else

Proficient: the determinants of strong performance in a role

Foundational: the fundamentals of basic performance in a role

Pre-foundational: still learning the basics of the role

Please take the time to review each Winning Practice and the Criteria for each level. [attachment "2007 WP's for Reps.pdf" deleted by Frank T Buchanan/RTP/PSF/GSK)

When you have the background, please fill out the self assessment below and send it to me by January 16th.

I don't want you working on this over the holiday…You have until the middle of January. You have time. I just wanted to get this out before I shut down for the year… I didn't want to forget and have it be a fire drill.

[attachment "Sales Representative Winning Practice Self Assessment 1-2008.doc" deleted by Frank T Buchanan/ RTP/PSF/GSK\

Tom Tyma, R.N.
District Sales Director
Desert Peaks Region (AZ, CO, NM, NV, UT, WY)
GlaxoSmithKline Inc.
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Scottsdale, AZ 85254
Office – 602 404-0287
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***

Appendix U

Winning Practices for Sales Representatives Assessment

Rate Skills

Starting with Winning Practice #1, evaluate how consistently and effectively you as a representative demonstrates the behaviors listed for each of the three skills (Analyze, Plan, Execute). Rate each skill independently. Choose the proficiency level at which the representative consistently and effectively demonstrates most or all of these behaviors. For example:

- If all of the Foundational behaviors are consistently and effectively demonstrated, and a few Proficient or Expert behaviors are also occasionally demonstrated, rate as FOUNDATIONAL, because this is the level at which they are consistently and effectively demonstrating the expected behaviors.

- If most of the Foundational behaviors are not being consistently and effectively demonstrated, rate as "PRE-FOUNDATIONAL."

Rate Winning Practices

Consider your proficiency ratings for all three skills of Winning Practice #1. Average the ratings and this will generally tell you the appropriate overall rating for that Winning Practice. When one skill is rated much lower than the others, it brings down the overall proficiency level for that Winning Practice. For example:

- If two skills are rated Expert and one is rated Foundational, the overall Winning Practice would typically be rated as PROFICIENT.

- If two skills are rated Proficient and one is rated Pre-Foundational, the overall Winning Practice would typically be rated as FOUNDATIONAL.

***

[Table Omitted]

***

Continue rating each of the remaining Winning Practices in this way.

***

GSK Annual Performance and Development Plan

Name/ Territory Number	Buchanan, Frank T (Frank Buchanan)	T2DHA2	Grade:	S09
Title/ Sales Force	Pharma Sr Sales Rep		Plan Year:	2006 Field Sales PDP Cycle

Appendix U

Employee comments on Product Goal Achievement and Accomplishments for Sales

Link to Incentive Edge

My ranking has been as high as 7/22 and is now 9/22. This year we overcame a great deal of adversity with vacant positions and the perceived safety concerns of Advair. Because our TST has nearly twice as many Ped's as any other, the impact of the perceived safety concerns impacted us more than most. Overall, I am happy with my ranking in light of the challenges we faced.

Director/Manager Comments on Employee Goal Achievement and Accomplishments for Sales
Winter: Reg 8/21 38.1% Natl. 99/585 16.9%
Spring: Reg 9/22 40.9% Natl. 78/605 12.9%
Summer: Reg 9/22 40.9% Natl. 120/562 21.4%
Fall: Reg 9/21 42.9: Natl 180/580 31.0%

Frank was consistent this year. His regional performance did not vary much. Frank's national performance slipped, starting in the top 20% during the first 2 quarters and finishing the final 2 quarters in the top 31%. It was a good year but not II great year. Pediatricians and Allergists were Frank's biggest challenge. These 2 specialties (especially the PEDs) reacted negatively to the SMART study and the Salpeter article. Frank worked very hard to keep the reduction in prescription and marked share to a minimum. He continues to fight the battle and these specialties have begun to respond. Frank must keep the pressure on the PEDs this coming year and bring them back to feeling confident that they are prescribing the best asthma medication for their patients an confidence that is a very safe medication.

***

[Tables omitted]

Employee Comments on their individual contribution toward creating a more effective team. How did they impact sales results and relationships with customers by working effectively with their team? (Communication, Collaboration, routing plan, etc.)
When our Imitrex numbers tanked in response to an open position, I Revised the routing plan to maximize the team's return on each call while balancing the vacancies and Vesicare commitment. This was controversial with the team because the changes I felt needed to occur, required highly tenured and experienced teammates to change their routing plan. I was met with great resistance when I proposed the new plan because these folks had been following their routing plan for years and I had recently transferred from another territory. I was able to convince my team to make the changes and our Imitrex ranking went from 22/22 to 3/22 the following quarter and 2/22 the subsequent 2 quarters (current position).

Director/Manager Comments on Employee Selling Skills and Team Work Skills:
Frank is a valuable asset to the district team and the TST team. He thinks about the business, what is working, what is not working, and what can be done to grow the business.

When Frank (thinks about the business and what to do to grow the business he employs what he call his "as it method of thinking (if I look at the territory "as if" it were my own small business, how would I spend my resources to maximize my return on investment). This is one of Frank's strengths and his philosophy is beginning to catch on with the rest of the TST and district members. Franks selling skills overall are strong. He should continue to further develop his closing skills by being very specific about what he asks the customer to do and that he follows up on the next call to see whether the customer has followed through on their commitment. Frank should also broaden his knowledge of the approved clinical studies for Imitrex in migraine headache and Vesicare for OAB.

Development Plan

Experience and Development (Employee Completes): List development experiences completed in the past year.

I was selected by Ken Lowery to be an Associate Trainer for the T2D Region for 2007/08. I am also the Diversity Champion for Central Phoenix. In addition to these formal positions, I also create the routing plan for our team and conduct a vast majority of the data analysis.

Development Aspirations (Employee Completes): Describe professional interests/career aspirations both short term (1-3 years).

In the next 2 years, I will complete the RDP Program and move into an MCR or other advanced position. In the next 3-5 years I will move into a DSM position.

Appendix U

Strengths (Employee Completes): List at least 2.3 GSK Winning Practices and include other areas of knowledge and experience as appropriate.

Own the Territory Business – I function at an "expert" level with this winning practice. I evaluate the territory routinely and anticipate trends. I also utilize all resources to the maximum to create favorable outcome. Lastly, I consistently take initiative to identify potential/actual advantages and challenges. I then take the lead to maximize the advantages and reduce the impact of the challenges.

Work As A Team To Drive Results – I function at an "expert" level with this winning practice. I take a strong leadership role on the team to develop short term and stretch goals. I think creatively about how to gain more business and get buy in from my team to use new tactics. I remain in consistent communication with the Philly team as well as our MCR. I work to solve all problems that surface on the team and act as a coach on a consistent basis.- Overall, I fill whatever hole is leaking.

Plan Every Call – I function at an "expert" level with this winning practice. I work exceptionally hard to plan each call to maximize the return on my time I spend there. I review data as soon as it is available and strategize to maximize upward trends while heading off the downward. I work to give each team member a specific call objective for Advair to maximize efficiency and create consistency.

Appendix U

Development Needs/Gaps (Employee and Director/ Manager Completes): List at least 2-3 GSK Winning Practices and include others as identified.

Development Area	**Development Action**	**Target Date**
Gain the best possible commitment on every call	Read "The Inner Game of Selling: Mastering the Hidden Forces that Determine Your Success." Pick 2-3 pearls you gained from the book. Send me an email outlining the 2-3 pearls and how you will apply them in your everyday selling.	06/01/2007
Master disease area and product knowledge	Plan and organize 3 meetings with your TST to share product knowledge. Have each team member take a few minutes to present on a product, including clinical studies that pertain to specific patient types.	12/14/2007

Gain insight into key customers	Read "Whale Done: The Power of Positive Relationships." Pick 2-3 Pearls you gained from the book. Send me an email outlining the 2-3 pearls and how you will apply them in your everyday selling	06/29/2007

Director/Manager Comments on Aspirations and Overall Developments:

Frank was appointed as an associate sales trainer (AT) in '06. He is also fulfilling duties as the district Diversity Champion. Frank has applied for the RDP and we are awaiting the decision of the selection committee. He is taking advantage of opportunities for development and making himself visable to upper management. I support Frank's desire to continue to develop his skills and I support his aspirations to move into an advanced position and ultimately into a DSM position. Frank's sales achievements since he joined the company have been at or above goal. This year is no exception. He has responded well in adversity (the LABA issue) by facing the problem head on, getting in front of the customers with the greatest concerns with answers and by bringing in nationally known experts in the treatment of asthma to speak to their concerns. Frank has worked methodically and patiently to turn this issue around this past year. He has made good strategic decisions and has followed through on his plans and commitments.

APPENDIX V — GSK ANNUAL PERFORMANCE AND DEVELOPMENT PLAN (DEF. EX. C, BUCHANAN DEP. EX. 16)

GSK Annual Performance and Development Plan (Def. Ex. C, Buchanan Dep. Ex. 16)

Name/ Territory Number	Buchanan, Frank T (Frank Buchanan)	T2DHA2	Grade:	S09
Title/Sales Force	Pharma Sr Sales Rep		Plan Year:	2006 Field Sales PDP Cycle

Employee comments on Product Goal Achievement and Accomplishments for Sales
Link to Incentive Edge

My ranking has been as high as 7/22 and is now 9/22. This year we overcame a great deal of adversity with vacant positions and the perceived safety concerns of Advair. Because our TST has nearly twice as many Ped's as any other, the impact of the perceived safety concerns impacted us more than most. Overall, I am happy with my ranking in light of the challenges we faced.

Director/Manager Comments on Employee Goal Achievement and Accomplishments for Sales
Winter: Reg 8/21 38.1% Natl. 99/585 16.9%
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Summer: Reg 9/22 40.9% Natl. 120/562 21.4%
Fall: Reg 9/21 42.9: Natl 180/580 31.0%

Frank was consistent this year. His regional performance did not vary much. Frank's national performance slipped, starting in the top 20% during the first 2 quarters and finishing the final 2 quarters in the top 31%. It was a good year but not II great year. Pediatricians and Allergists were Frank's biggest challenge. These 2 specialties (especially the PEDs) reacted negatively to the SMART study and the Salpeter article. Frank worked very hard to keep the reduction in prescription and marked share to a minimum. He continues to fight the battle and these specialties have begun to respond. Frank must keep the pressure on the PEDs this coming year and bring them back to feeling confident that they are prescribing the best asthma medication for their patients an confidence that is a very safe medication.

***

[Tables omitted]

Employee Comments on their individual contribution toward creating a more effective team. How did they impact sales results and relationships with customers by working effectively with their team? (Communication, Collaboration, routing plan, etc.)

When our Imitrex numbers tanked in response to an open position, I revised the routing plan to maximize the team's return on each call while balancing the vacancies and Vesicare commitment. This was controversial with the team because the changes I felt needed to occur, required highly tenured and experienced teammates to change their routing plan. I was met with great resistance when I proposed the new plan because these folks had been following their routing plan for years and I had recently transferred from another territory. I was able to convince my team to make the changes and our Imitrex ranking went from 22/22 to 3/22 the following quarter and 2/22 the subsequent 2 quarters (current position).

Director/Manager Comments on Employee Selling Skills and Team Work Skills:
Frank is a valuable asset to the district team and the TST team. He thinks about the business, what is working, what is not working, and what can be done to grow the business. When Frank thinks about the business and what to do to grow the business he employs what he calls his "as it method of thinking (if I look at the territory "as if" it were my own small business, how would I spend my resources to maximize my return on investment). This is one of Frank's strengths and his philosophy is beginning to catch on with the rest of the TST and district members. Frank's selling skills overall are strong. He should continue to further develop his closing skills by being very specific about what he asks the customer to do and that he follows up on the next call to see whether the customer has followed through on their commitment. Frank should also broaden his knowledge of the approved clinical studies for Imitrex in migraine headache and Vesicare for OAB.

Development Plan

Experience and Development (Employee Completes):
List development experiences completed in the past year. I was selected by Ken Lowery to be an Associate Trainer

for the T2D Region for 2007/08. I am also the Diversity Champion for Central Phoenix. In addition to these formal positions, I also create the routing plan for our team and conduct a vast majority of the data analysis.

Development Aspirations (Employee Completes): Describe professional interests/career aspirations both short term (1-3 years)
In the next 2 years, I will complete the RDP Program and move into an MCR or other advanced position. In the next 3-5 years I will move into a DSM position.

Strengths (Employee Completes): List at least 2.3 GSK Winning Practices and include other areas of knowledge and experience as appropriate.
Own the Territory Business – I function at an "expert" level with this winning practice. I evaluate the territory routinely and anticipate trends. I also utilize all resources to the maximum to create favorable outcome. Lastly, I consistently take initiative to identify potential/actual advantages and challenges. I then take the lead to maximize the advantages and reduce the impact of the challenges.

Work As A Team To Drive Results – I function at an "expert" level with this winning practice. I take a strong leadership role on the team to develop short term and stretch goals. I think creatively about how to gain more business and get buy in from my team to use new tactics. I remain in consistent communication with the Philly team as well as our MCR. I work to solve all problems that surface on the team and act as a coach on consistent basis.- Overall, I fill whatever hole is leaking.

Appendix V

Plan Every Call – I function at an "expert" level with this winning practice. I work exceptionally hard to plan each call to maximize the return on my time I spend there. I review data as soon as it is available and strategize to maximize upward trends while heading off the downward. I work to give each team member a specific call objective for Advair to maximize efficiency and create consistency.

Development Needs/Gaps (Employee and Director/ Manager Completes): List at least 2-3 GSK Winning Practices and include others as identified.

Development Area	**Development Action**	**Target Date**
Gain the best possible commitment on every call	Read "The Inner Game of Selling: Mastering the Hidden Forces that Determine Your Success." Pick 2-3 pearls you gained from the book. Send me an email outlining the 2-3 pearls and how you will apply them in your everyday selling.	06/01/2007

Master disease area and product knowledge	Plan and organize 3 meetings with your TST to share product knowledge. Have each team member take a few minutes to present on a product, including clinical studies that pertain to specific patient types.	12/14/2007
Gain insight into key customers	Read "Whale Done: The Power of Positive Relationships." Pick 2-3 Pearls you gained from the book. Send me an email outlining the 2-3 pearls and how you will apply them in your everyday selling	06/29/2007

Director/Manager Comments on Aspirations and Overall Developments:

Frank was appointed as an associate sales trainer (AT) in '06. He is also fulfilling duties as the district Diversity Champion. Frank has applied for the RDP and we are awaiting the decision of the selection committee. He is taking advantage of opportunities for development and making himself visable to upper management. I support Frank's desire to continue to develop his skills and I support his aspirations into moving into an advanced position and ultimately into a DSM position. Frank's sales achievements since he joined the company have been at or above goal. This year is no exception. He has responded well in adversity (the LABA issue) by facing the problem head on, getting in front of the customers with the greatest concerns with answers and by bringing in nationally known experts in the treatment of asthma to speak to their concerns. Frank has worked methodically and patiently to turn this issue around this past year. He has made good strategic decisions and has followed through on his plans and commitments.

APPENDIX W — FIELD COACHING TOOL (BUCHANAN DEP. EX. 19, BUCHANAN DEP. EX. 20)

FIELD COACHING TOOL
(Buchanan Dep. Ex. 19)

PHARMA SALES REP: BUCHANAN, FRANK (T2DHA2)

DISTRICT SALES MGR: GOLSON, JOSEPH

Territory: T2DHA2

Date of Creation: 10/02/2006

Date(s)/Area Worked: October 2 & 3, 2006 – Phoenix Central

KEY SALES METRICS Review and provide your feedback below.

Coaching Feedback
Frank ended the winter quarter ranked 8 /21 (38.1%) in the region and 99/585 (16.9%) in the nation. At the end of the spring quarter Frank was ranked 9/22 (40.9%) in the region and 78/605 (12.9%) in the nation. While Frank declined in regional rank he improved his national rank. The July InSight Monthly report shows Frank ranked 21/22 for Advair volume percent change, 12/22 for Advair market share point change, and 6/22 for Imitrex volume percent change. Frank is meeting or exceeding expectations for professional calls/day average, details/call average, and pharmacy calls/day average.

Appendix W

SALES CALL OBJECTIVES How effectively were today's sales call objectives met?

Coaching Feedback
Frank's primary objective was to help peds enhance their assessment of a patient's level of asthma control using the Asthma Control Test (ACT). The objective included positioning Advair as the medication to prescribe when patients on a single controller scored less than or equal to 19 on ACT. Frank effectively tied the lack of asthma control on a single controller to the need to prescribe Advair.

Were the following areas affectively addressed?

	Frequently	**Occasionally**	**Seldom**
When the customer(s) should use his/her brand(s)	X		
Why the customer(s) should use his/her brand(s)? Did you deliver the core message each product detailed?	X		
How the customer(s) use his/her brand	X		

Coaching Feedback	**Frank effectively addressed when, why, and how during product discussions**		

Were the following Sales Tactics effectively addressed?

***

[Table omitted]

Appendix W

GSK Sales Call Model Provide specific examples/ observations of:

Steps in the Sales Call Model	**Areas of Strength**	**Areas of Development**
Pre-Call Planning: Reviewing and analyzing customer profiles, Setting SMART sales call objectives, Organizing sales calls to maximize results	As a result of the POA change for the fall quarter, Frank has developed a route plan and call strategy for those with Advair responsibility, asthma & COPD. Frank recognized that Peds were one of the specialties that were hurting the growth of Advair. He set an objective in conjunction with Jeremy Todd, to bring in Dr. Stoloff to address asthma control and the NIH Guidelines for the treatment of asthmas control. This program is focused strictly on pediatric asthma	

Appendix W

Opening/ Rapport: Building a relationship with the Total Practice, Gaining customer interest through an engaging opening statement, Transitioning from a general dialogue to painting a patient picture		
Uncovering Needs: Asking insightful questions, active listening		
Positioning Brand Benefits: Link features and benefits, deliver key selling messages, core message and feature/benefit statements that support the core message		

Closing/ Bridging: Recognizing buying signals, asking for a commitment, introducing (or bridging to) 2nd position brand	Frank was effectively gaining a firm commitment from customers to attend or not attend the Dr. Stoloff presentation to pediatricians on 10/25. He was professionally assertive in obtaining a firm yes or a firm no to attending the program	
Post-Call Analysis: Updating customer profile, conducting self-evaluation, following up on promises		

Answering Questions and Concerns: Using the APACT process (Acknowledge, probe, answer, confirm, and transition) for addressing questions and concerns; using the MILD framework (Misconceptions, Indifference, Limitations, Doubts) to answer questions and concern		

Select up to 3 **Winning Practices** for focus and record the demonstrated behavior.

***

[table omitted]

Appendix W

Coaching Feedback
Frank was assertive and persistent when asking customers to commit to attending Dr. Stoloff's presentation on 10/25. There is a sense of urgency to get pediatricians to attend who have reduced their prescribing of Advair since the SMART study was in the news. I would like to see this sense of urgency, persistence, and assertiveness when asking for commitment to prescribe Advair for patients not well controlled on a single controller. Frank regularly analyzes the territory and looks for ways to improve the effectiveness in the territory. With the loss of the GP representative in the territory Frank took it upon himself to adjust the routing schedule for himself and sell the idea to his Advair teammates. By Frank instigating change this will hopefully lead to an effective plan to grow the business with one teammate gone.

***

[tables omitted]

Sales Representative Comment
Advair was a struggle through the summer. I'm confident that the Stoloff dinner the end of July will impact the volume change for August and pull up the quarter. Weekly sales numbers show that Advair volume is growing aggressively. Imitrex continues to perform. I have made key changes to the routing plan due to the vacancy in the district to insure success continues in light of being short handed. I am attacking the ped market and expect Fall Quarter to be strong in this arena.

Appendix W

FIELD COACHING TOOL
(Buchanan Dep. Ex. 20)

PHARMA SALES REP: BUCHANAN, FRANK (T2DHA2)

DISTRICT SALES MGR: GOLSON, JOSEPH

Territory: T2DHA2

Date of Creation: 11/07/2006

Date(s)/Area Worked: November 7, 2006 – Phoenix Central

KEY SALES METRICS Review and provide your feedback below.

Coaching Feedback
Frank ended the winter quarter ranked 8/21 (38.1%) in the region and 99/585 (16.9%) in the nation. At the end of the spring quarter Frank was ranked 9/22 (40.9%) in the region and 78/605 (12.9%) in the nation. While Frank declined in regional rank he improved his national rank. Monthly Territory GSK Sales & Activity, ADVAIR FRANCHISE TOTAL, August 2006, QTD Vol % Chg -3.1, Mkt Shr Pt Ch-1.9

SALES CALL OBJECTIVES How effectively were today's sales call objectives met?

Appendix W

Coaching Feedback
Frank effectively met the majority of his objectives. He knew going into Dr. Deborah Gonzales' office that it would be difficult to move her away from prescribing monteleukast but Frank planned to chip away at monteleukast using the Nelson study. At the end of the conversation Frank got Dr. Gonzales to agree to reserve monteleukast as add on therapy after Advair, if needed.

Were the following areas affectively addressed?

	Frequently	Occasionally	Seldom
When the customer(s) should use his/ her brand(s)	X		
Why the customer(s) should use his/ her brand(s)? Did you deliver the core message each product detailed?	X		
How the customer(s) use his/her brand	X		

Coaching Feedback	**Frank effectively addressed when, why, and how during sales calls**		

Were the following Sales Tactics effectively addressed?

***

[Table omitted]

GSK Sales Call Model

Appendix W

Provide specific examples/observations of:

Steps in the Sales Call Model	Areas of Strength	Areas of Development
Pre-Call Planning: Reviewing and analyzing customer profiles, Setting SMART sales call objectives, Organizing sales calls to maximize results	Frank arrived with a written plan for the day. The plan contained an overview of historical prescribing data w/ competitive info and an objective for each practitioner. Sales materials were well organized and Frank was ready to sell.	Build stretch objectives for each call. Visualize the best possible outcome for the call, realistically, and make that your objective.

Appendix W

Opening/ Rapport: Building a relationship with the Total Practice, Gaining customer interest through an engaging opening statement, Transitioning from a general dialogue to painting a patient picture		
Uncovering Needs: Asking insightful questions, active listening		
Positioning Brand Benefits: Link features and benefits, deliver key selling messages, core message and feature/benefit statements that support the core message		

Appendix W

Closing/ Bridging: Recognizing buying signals, asking for a commitment, introducing (or bridging to) 2nd position brand	There were times when Frank delivered a solid close. For example with Drs. Collins and LeGris he received a firm commitment from them to use ACT in their practice to assess the degree of asthma control in patients	Know the exact commitment you want before entering the call. Ask for a firm commitment that is built on agreement received during the selling conversation. Try to nudge them out of their comfort zone. If you get "no" then the selling can begin.

Post-Call Analysis: Updating customer profile, conducting self-evaluation, following upon promises	Frank used previous post-call analysis for Dr. Gonzales to set the opening for the current call. He consistently discussed the outcome of each call at the conclusion and assessed whether the objective was met.	Clearly identify next steps to take with the customer. Consider what studies may convince them to change.

Appendix W

Answering Questions and Concerns: Using the APACT process (Acknowledge, probe, answer, confirm, and transition) for addressing questions and concerns; using the MILD framework (Misconceptions, Indifference, Limitations, Doubts) to answer questions and concern		

Select up to 3 **Winning Practices** for focus and record the demonstrated behavior.

***

[table omitted]

Appendix W

Coaching Feedback
Frank demonstrated a fluency with the Nelson study. He was well versed on the validity of ACT and he demonstrated a full understanding of asthma presentation. Frank will work on complete fluency with Condemi and Kavuru to be able to spontaneously discuss them on the spot. Frank is having lunch w/ Danielle tomorrow to help her with her PK for COPD. He is the one who makes recommendations for improving business practices like maximizing sampling or focusing in on [word illegible] prescribers whose numbers are falling. He freely shares his ideas and is there for all the members of the territory

***

[tables omitted]

Sales Representative Comment
I am doing many things consistently well on all sales calls (i.e. planning, questions, rapport building, presenting data). I do need to continue to improve my consistency with gaining the best possible commitment from each provider on each call. Paula and I are working exceptionally well together to cover the key providers even though we have a vacant Glaxo Pharm Rep. Sales data will continue to improve as a result of this work.

APPENDIX X — DECLARATION OF ROBERT PELLEGRINO IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED MAY 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV08-01498-PHX-FJM

Michael Shane Christopher

Plaintiffs,

vs.

SmithKline Beecham Corporation, d/b/a
GlaxoSmithKline

Defendant.

DECLARATION OF ROBERT PELLEGRINO

I, ROBERT PELLEGRINO, hereby declare as follows:

1. I currently am employed by SmithKline Beecham Corporation d/b/a GlaxoSmithKline as the Incentive Compensation Information & Governance Manager, and I have held this position since October 2007. I am responsible for Sales Incentive Management ("SIM") support for Incentive Compensation ("IC") design, development, implementation, assessment, analysis, and operations for nine business units or divisions and roughly

10,000 employees. This role is responsible for central information, governance, and policy management across all business units and incentive plan and is key to the overall management of SIM integrating the inputs and outputs of the Plan Management, Plan Design and Plan Operations work in SIM, and contributing to the overall effectiveness and efficiency of the team.

2. I held the position of Manager, Specialty Incentive Plan and Winners' Circle from January 2004 until October 2007, though from June 2006 until March 2007 I served as the Acting Director Sales Incentive Management. I have worked in positions involving GlaxoSmithKline's incentive compensation plans since December 2002, and I have been employed by GlaxoSmithKline or one of its predecessor companies since 1988.

3. I have personal knowledge of the facts set forth in this Declaration, and, if called and sworn as a witness, I could and would testify as to their accuracy.

4. I make this Declaration entirely of my own free will and choice. No promises of benefits or threats have been made to me to persuade me to sign it.

5. I am familiar with the types of incentive compensation programs utilized by GlaxoSmithKline for its sales representatives.

6. Each GlaxoSmithKline sales representative is paid a base salary and is eligible to receive incentive compensation. Incentive compensation is a significant

component of sales representative compensation, and almost every sales representative receives incentive compensation.

7. Incentive compensation is designed to reward sales representatives for meeting or exceeding various goals established by GlaxoSmithKline management. The goals that are established are designed to incentivize sales representatives to achieve objectives that GlaxoSmithKline management determines are important.

8. Each quarter, each sales representative is given specific instructions regarding the incentive compensation program that is applicable to the sales representative. That program can, and regularly does, change from quarter to quarter.

9. Regular bonuses are awarded to sales representatives using a number of different approaches. For example, sales representatives may receive regular bonuses for: (i) increasing the market share of GlaxoSmithKline products for which sales representatives are responsible in the territory for which they are responsible, (ii) increasing the sales volume for GlaxoSmithKline products for which sales representatives are responsible in the territory for which they are responsible, (iii) increasing the sales revenues for GlaxoSmithKline products for which sales representatives are responsible in the territory for which they are responsible, (iv) increasing the dose volume for GlaxoSmithKline products for which sales representatives are responsible in the territory for which they are responsible, and (v) combinations of the foregoing.

Performance under these sort of objective standards might be measured against national goals, geographic territorial goals, provider type goals (e.g., institutional healthcare providers v. individual healthcare providers), or combinations of the foregoing.

10. Notably, each of these incentive compensation measures will have a different impact on a sales representative's activities. - For example, if a sales representative receives incentive compensation for a particular product based on market share increase, that sales representative might focus their effort on explaining what attributes of the GlaxoSmithKline product make it particularly well-suited for addressing a particular disease state relative to a competitor's product. In contrast, if a sales representative receives incentive compensation for a particular product based on sales volume increase, that sales representative would be less concerned with the relative product characteristics and, instead, would be more concerned with simply encouraging the healthcare provider to prescribe the product more frequently to appropriate patients.

11. During the course of their employment by GlaxoSmithKline, Michael Shane Christopher and Frank Buchanan received regular bonuses based on increasing the market share and/or sales volume for the products for which they were responsible in the territories for which they were responsible, and successfully increasing that market share and/or sales volume directly lead to increased compensation for them.

12. In each full year of his employment by GlaxoSmithKline, a significant portion of Christopher's total compensation was incentive-based. In 2004, he received $29,993 in incentive compensation, which was 41% of his $72,576 in gross pay. In 2005, he received $21,231 in incentive compensation, which was 32% of his $67,243 in gross pay. In 2006, he received $28,429 in incentive compensation, which was 37% of his $77,552 in gross pay.

13. In each full year of his employment by GlaxoSmithKline, a significant portion of Buchanan's total compensation was incentive-based. In 2004, he received $19,232 in incentive compensation, which was 27% of his $70,740 in gross pay. In 2005, he received $23,743 in incentive compensation, which was 32% of his $74,358 in gross pay. In 2006, he received $32,519 in incentive pay, which was 38% of his $84,932 in gross pay. In 2007, he received $19,957 in incentive compensation, which was 26% of his $75,776 in gross pay.

I have read this Declaration and I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

EXECUTED this day of May, 2009

/s/
Robert Pellegrino

APPENDIX Y — DECLARATION OF CYNTHIA S. ROBINSON IN THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, DATED AUGUST 17, 2009

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

MICHAEL SHANE CHRISTOPHER,

Plaintiff,

Vs.

SMITHKLINE BEECHAM CORPORATION,
d/b/a GLAXOSMITHKLINE,

Defendant.

DECLARATION OF CYNTHIA S. ROBINSON

I, CYNTHIA S. ROBINSON, hereby declare as follows:

1. I am a resident of the State of Alabama, over the age of 18, and have personal knowledge of the facts stated in this declaration.

2. I have been employed by SmithKlineBeecham Corporation, d/b/a GlaxoSmithKline, since 1993. I am currently employed as an Executive Healthcare Specialist in the Consumer Health Division with a territory in Alabama.

3. I submitted an affidavit in February 2005 in connection with a case entitled Earl Lee Faulk v. GlaxoSmithKline PLC, No. 2:05CV85-F, which was filed with the Middle District of Alabama.

4. I have never worked in: "Research Triangle Park-Pharma," (or "RTP Pharma") group or the "Philadelphia-Pharma" (or "Philly Pharma") group, as a Sales Representative, Pharmaceutical Sales Representative, Senior Sales Representative, Pharmaceutical Senior Sales Representative, Executive Sales Representative, Executive Pharmaceutical Sales Representative, Pharmaceutical Executive, Sales Representative, or Pharmaceutical Senior Executive Sales Representative; or in a position within the "Pharmaceutical" (or "General Pharma") group comparable to the positions listed above.

5. I have personal knowledge of the facts set forth in this Declaration, and, if called and sworn as a witness, I could and would testify as to their accuracy.

6. I make this Declaration entirely of my own free will and choice. No promises or benefits or threats have been made to me to persuade me to sign it.

I have read this Declaration, and I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed this 17 day of August, 2009

/s/
Cynthia S. Robinson

APPENDIX Z — DECLARATION OF CARMEN HOSS IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, DATED AUGUST 14, 2009

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF ARIZONA

No. CV08-01498-PHX-FJM

Michael Shane Christopher

Plaintiffs,

vs.

SmithKline Beecham Corporation, d/b/a
GlaxoSmithKline,

Defendant.

DECLARATION OF CARMEN HOSS

I, CARMEN HOSS, hereby declare as follows:

1. I am a resident of the State of New Mexico, over the age of 18, and have personal knowledge of the facts stated in this declaration.

2. I have been employed as a sales representative by SmithKline Beecham Corporation, d/b/a GlaxoSmithKline since 2000. I am currently employed as a Senior Executive Pharmaceutical Sales Representative with a territory in New Mexico. I am responsible for selling Levitra, Avodart, and Valtrex.

3. I submitted a declaration in 2008 in connection with a case entitled Martinez, et al. v. SmithKline Beecham Corporation, d/b/a GlaxoSmithKline and Carmen Hoss, which was filed in New Mexico.

4. In the prior declaration I stated that I "detailed" GSK products. By that I meant that I provide approved information about GSK's products to physicians as part of the overall goal of influencing those physicians to prescribe GSK's products to their patients when it is medically appropriate to do so. To me, "influencing" physicians to prescribe GSK's products is the same as "selling" GSK's products since without the physician's prescription the product will not be sold for use by the patient.

5. In my prior declaration I also stated that "(m)y responsibilities as a sales representative include providing approved information to physicians about certain prescription medicines sold by GSK." I did not say that providing such information is the only responsibility I have. In fact, I also spend time analyzing data about physicians, their prescribing habits, their patient population, and many other items to determine such things as which physicians to call on, when and how often to call on them, and what products and specific information about those products to focus on with each physician, in order to sell GSK's products by convincing them to prescribe GSK's products to the medically appropriate patients.

Appendix Z

I declare under penalty of perjury under the laws of the United States of America, 28 USC 1746, that the foregoing is true and correct.

EXECUTED this 14 day of August, 2009.

/Carmen Hoss

PETITIONER'S BRIEF

6

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A GLAXOSMITHKLINE,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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QUESTIONS PRESENTED

(1) Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations.

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies the parties to the proceedings below. Respondent is now known as GlaxoSmithKline LLC.

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BRIEF FOR THE PETITIONERS

Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (Pet. App. 1a-36a) is reported at 635 F.3d 383. The opinion of the district court granting respondent's motion for summary judgment (Pet. App. 37a-47a) is unreported but available at 2009 WL 4051075. The district court's subsequent opinion denying petitioners' motion to amend or alter the judgment (Pet. App. 48a-52a) is unreported but available at 2010 WL 396300.

JURISDICTION

The petition for certiorari was timely filed on August 12, 2011 and granted on November 28, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions are reproduced as an Appendix to this brief.

STATEMENT OF THE CASE

Petitioners were employed by respondent as "detailers" with the responsibility to promote respondent's pharmaceutical products to doctors. Petitioners were prohibited by both law and industry practice from actually selling respondent's products, and did not do so. Because detailers routinely work more than forty hours per week but respondent refuses to pay them overtime compensation, petitioners brought this action under the Fair Labor Standards Act. Respondent countered that petitioners are exempt from overtime as "outside salesmen." Pursuant to a congressional directive, the Secretary of Labor has issued regulations interpreting the "outside salesman" exemption to exclude employees who do not consummate sales themselves but instead engage in promotional work that supports sales by other employees. On that basis, the Department of Labor has specifically concluded that pharmaceutical detailers such as petitioners are not "outside salesmen." The Ninth Circuit construed the regulations as supporting respondent. It furthermore held that the agency's own contrary interpretation of its regulations was neither controlling under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), nor persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

I. Statutory And Regulatory Background

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. § 201 *et seq.*, generally requires employers to pay employees time-and-one-half wages for work in excess of a forty-hour workweek. 29 U.S.C. § 207(a). The statute exempts certain categories of employees including, *inter alia*, an "outside salesman." *Id.* § 213(a)(1). Instead of elaborating on the scope of these categories, the statute directs the Secretary of Labor to "define[] and delimit[]" the exemptions. *Id.*

Pursuant to that express directive, the Secretary promulgated regulations by notice-and-comment rulemaking. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer

Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004). The regulations specify that an "outside salesman" must have as his "primary duty" "making sales within the meaning of Section 3(k) of the [FLSA]," 29 C.F.R. § 541.500(a)(1)(i), which defines "sale" or "sell" to "include[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition," 29 U.S.C. § 203(k).

The Secretary's regulations then specifically address the situation of employees who engage in "promotional work," which "may or may not be exempt outside sales work, depending on the circumstances." 29 C.F.R. § 541.503(a). If the promotional work is "incidental to and in conjunction with an employee's own outside sales or solicitations," it is "exempt work." *Id.* By contrast, if it is "incidental to sales made, or to be made, by someone else," *id.*, or is "designed to stimulate sales to be made by someone else," *id.* § 541.503(b), it is "not exempt outside sales work." *Id.*

The Department has also provided additional guidance on the meaning of its regulations in other contexts. It has filed multiple *amicus curiae* briefs in the lower courts concluding that detailers are not outside salesmen. It has also explained that "[e]mployees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." 69 Fed. Reg. at 22,162 (quoting Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of Regulations Part 541*, at 83 (June 30, 1949) [hereinafter *Weiss Report*]). The Department's Field Operations Handbook further provides that "[s]oliciting business through a dealer or merchant to offer a product or service to a customer is not a sale within the meaning of 29 U.S.C. § 203(k)." U.S. Department of Labor, *Field Operations Handbook* § 22f01(e) (2010), *available at* http://www.dol.gov/whd/FOH/FOH_Ch22.pdf.

II. Petitioners' Job Responsibilities As Pharmaceutical Detailers

Respondent GlaxoSmithKline (GSK) (formerly SmithKline Beecham) is a pharmaceutical company. Pharmaceutical companies do not sell their drugs to physicians. Rather, they have employees who negotiate for the sales of drugs to pharmacies (almost exclusively through wholesale distributors). Pharmacies in turn sell the drugs to individuals who have an appropriate prescription. GSK also employs account managers to sell its medicines directly to pharmacies and hospitals. J.A. 129a-30a, 161a-62a.

Petitioners do not play any of those roles. Rather, petitioners are pharmaceutical sales representatives – also known as "detailers" – who were previously employed by respondent. Their job description is evocative. These employees provide medical professionals who prescribe pharmaceuticals with the "details" of pharmaceutical products, seeking to educate the prescribers with the ultimate goal of influencing their prescribing decisions. J.A. 106a, 115a-16a, 167a. Detailers make no "sales" themselves.

Petitioners' primary responsibility was to give physicians information provided by GSK so the physicians could use their own judgment in deciding whether to prescribe a GSK product. J.A. 18a, 116a.

Physicians thus regard detailers as resources with information about the safety, efficacy, and tolerability of products. *Id.* During a typical detailing visit, petitioners spoke with a prescriber about GSK products, the benefits of those products, and the patient types for whom the products might be appropriate. *Id.* 30a-31a, 116a.

For petitioners actually to sell drugs would have been illegal, contrary to the physicians' ethical responsibilities, and in violation of the company's policy under industry guidelines. It is illegal because the Prescription Drug Marketing Act of 1987 strictly regulates the sale of pharmaceutical products, including by outlawing the sale of drug samples – the only inventory that detailers are permitted to carry. *See* 21 U.S.C. §§ 353(c), (d), (t), 333(b)(1)(B); 21 C.F.R. §§ 203.30-203.39 (setting forth regulatory restrictions on the distribution of samples by detailers and others).

Further, "physicians have an ethical obligation to prescribe only drugs suitable for their patients' medical needs, meaning that *they cannot make a binding commitment* . . . to prescribe a particular [company's] product." *In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 154 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011); *see* American Medical Association, Code of Medical Ethics § 8.06(1) ("[p]hysicians should prescribe drugs . . . solely upon medical considerations and patient need and reasonable expectations of the effectiveness of the drug").

Respondent also subscribes to a regime of industry self-regulation, which prohibits detailers from undermining a prescriber's medical judgment to make prescribing decisions exclusively based on the needs of each individual patient. The Pharmaceutical Research and Manufacturers of America (PhRMA) has published a Code on Interactions with Healthcare Professionals (Code), to which GSK is a signatory. The Code seeks to preserve physicians' independent decision making and provides that "a healthcare professional's care of patients should be based, and should be perceived as being based, solely on each patient's medical needs and the healthcare professional's medical knowledge and experience." PhRMA, *Code on Interactions with Healthcare Professionals* 2 (2008), *available at* http://www.phrma.org/sites/default/files/108/phrma_marketing_code_2008.pdf. The Code further states that "[n]othing should be offered or provided in a manner or on conditions that would interfere with the independence of a healthcare professional's prescribing practices." *Id.* at 13.

For those reasons, petitioners' detailing visits never resulted in a transaction that even resembled a sale. Physicians never placed an order with petitioners for GSK products, and they never entered into contracts to prescribe GSK products. J.A. 107a, 116a, 138a. Likewise, petitioners never engaged in negotiations that led to a sale. *Id.*

At most, petitioners asked physicians for a commitment to do something, such as read a clinical study, write a prescription in the appropriate circumstances, or attend a convention. But these efforts at persuasion did not result in binding or enforceable commitments. Consistent with their ethical obligations, physicians instead exercised their independent prescribing judgment in each case. J.A. 9a, 45a-46a, 49a-50a.

Indeed, it is impossible to trace the sale of a GSK product back to a detailing visit. J.A. 107a, 117a. In any given time period, multiple GSK detailers are assigned to visit the same physician. *Id.* 14a-15a, 117a. Moreover, GSK's promotional efforts are in no way limited to detailing. Rather, GSK employs a multitude of tools to disseminate its message, such as direct consumer advertising, mail advertising, articles in trade publications, and broadcast and print media advertising. *Id.* 135a-38a, 151a-52a.

III. Procedural History

GSK expected petitioners to work well in excess of forty hours a week. In addition to time spent in the field visiting physicians during the ordinary workday, J.A. 124a, 130a-32a, GSK also required petitioners to, for example, review new clinical reprints, learn modules, prepare for new product launches, answer calls, check email, check messages, and enter and transmit data reports, *id.* 154a-55a, tasks that required a further ten to twenty hours per week, *id.* 28a, 74a-76a.

Because GSK nonetheless refused to pay its detailers overtime, petitioners filed this collective action on behalf of the company's detailers, alleging that it had failed to provide them with overtime pay in violation of the FLSA. The district court disagreed and granted respondent summary judgment on the ground that petitioners were exempt "outside salesmen." Pet. App. 46a-47a.

Petitioners moved to alter or amend the judgment on the ground that the Department of

Labor had squarely taken the position in an *amicus curiae* brief that pharmaceutical detailers are not outside salesmen. The district court denied the motion. Pet. App. 52a.

Petitioners appealed, supported by the Department of Labor as *amicus curiae*. The Ninth Circuit nonetheless affirmed. Pet. App. 2a.

The court of appeals did not consider whether the Secretary's regulations resolve this case in petitioners' favor. Instead, it addressed "what, if any, deference we must accord to her view that [detailers] do not meet the primary duties test for the outside sales exemption." Pet. App. 16a.

The court concluded that it was "unable to accord *Auer* deference" to the Department's interpretation of the Secretary's regulations because of the regulations' supposed "failure to add specificity to the statutory scheme." Pet. App. 23a. On that view, "the Secretary has used her appearance as *amicus* to draft a new interpretation of the FLSA's language" notwithstanding that "there exists no meaningful regulatory language to interpret." *Id.* 23a-24a.

The Ninth Circuit then concluded that it would not "accord even minimal *Skidmore* deference" to the Secretary's interpretation, Pet. App. 34a, because in the court's view that interpretation "is both plainly erroneous and inconsistent with [the Secretary's] own regulations and practices," *id.* 24a. The court noted that the Department had long stated that "an employee must '*in some sense* make a sale.'" *Id.* 25a (quoting 69 Fed. Reg. at 22,162). The court of appeals also relied on what it characterized as FLSA

"Section 3(k)'s open-ended use of the word 'sale,' which *includes* 'other disposition[s].'" *Id.* 28a.

In the court's view, detailers engage in a "sale" because they are "hired for their sales experience," "trained in sales methods," "encourag[e] physicians to prescribe their products," and "receiv[e] commission-based compensation." Pet. App. 25a-26a. Further, in the court's view, "the relevant 'purchasers' in the pharmaceutical industry . . . are the prescribing physicians" because "the patient is not at liberty to choose personally which prescription pharmaceutical he desires." *Id.* 26a. On this view, "the 'sale' is the exchange of non-binding commitments between the [detailer] and physician at the end of a successful call. Through such commitments, the manufacturer will provide an effective product and the doctor will appropriately prescribe; for all practical purposes, this is a sale." *Id.*

The Ninth Circuit recognized that there are "firm legal barriers" that prevent detailers from "selling" goods as that term is used in other industries. Pet. App. 27a. But it regarded that fact as supporting its decision: "[b]ecause such barriers do exist in this industry, the fact that commitments are non-binding is irrelevant." *Id.*

The Ninth Circuit also recognized that the Secretary's regulations draw a "distinction between selling and promoting," but it concluded that this distinction "is only meaningful if the employee does not engage in *any* activities that constitute 'selling' under the Act." Pet. App. 31a. On the court's view, non-exempt "promotional work" is limited to work "directed to the public at large, as opposed to a particular client." *Id.* 32a. By contrast, detailing, "like any sales process, is *tailored* to the customer's preferences." *Id.*

Finally, the court found that its decision was "buttresse[d]" by what it perceived as "the Secretary's acquiescence in the sales practices of the drug industry for over seventy years." *Id.* 32a-33a. Although the Department had not previously opined on whether detailers are exempt outside salesmen, its "Dictionary of Occupational Titles" states that a detailer "[p]romotes use of and *sells* ethical drugs." *Id.* 34a (quoting U.S. Dep't of Labor, *Dictionary of Occupational Titles* § 262.157-010 (4th ed. 1991)) (emphasis in Pet. App.).

Both petitioners and respondent urged this Court to resolve a conflict between the Ninth Circuit's decision and the Second Circuit's decision in *Novartis*, which accepted the Department's view that detailers are not exempt outside salesmen. This Court granted certiorari. *Christopher v. SmithKline Beecham Corp.*, 80 U.S.L.W. 3098 (Nov. 28, 2011).

SUMMARY OF THE ARGUMENT

I. The Fair Labor Standards Act directs the Secretary of Labor to define and delimit the scope of the statute's "outside salesman" exemption. 29 U.S.C. § 213(a)(1). Pursuant to that directive, the Secretary promulgated notice-and-comment regulations that distinguish exempt work "making sales" from non-exempt "promotional work" that instead aids sales by others. 29 C.F.R. § 541.503. Under the Secretary's regulations, detailers are not exempt outside salesmen.

a. Detailers do not sell drugs, they promote them. Drug companies such as respondent GSK do not sell their products to physicians. Instead, they sell to wholesalers, which sell them to pharmacies, which sell them to customers. Although detailers promote a company's products to doctors, they are prohibited from actually selling pharmaceuticals both by federal law and industry practice, as well as by physicians' ethical obligation to make prescribing decisions based on the needs of individual patients.

This Court recently recognized the promotional role of detailers in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). In that case, the state contended that limitations on pharmaceutical detailing were properly regarded as economic regulation of commercial transactions between prescribers and drug companies. But this Court agreed with the pharmaceutical industry that detailing is protected speech under the First Amendment because the role of detailers is not to enter into a commercial transaction but instead to provide information about particular products.

In the event the regulations are ambiguous, they are properly read to exclude detailers from the category of "outside salesmen." It is settled that exemptions from overtime must be construed narrowly. *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

b. The Ninth Circuit's contrary reading of the regulations is unpersuasive. The court of appeals principally reasoned that under the regulations the term "sales" is defined to include any "other disposition," 29 C.F.R. § 541.500(a)(1)(i) (incorporating 29 U.S.C. § 203(k)), which the court read as "a broad catch-all category" that could include non-binding commitments to prescribe a product in an appropriate case. That reading of the regulations has many flaws. It cannot be reconciled with the explicit provision excluding "promotional work" that aids sales consummated by other employees. 29 C.F.R. § 541.503(b). It also ignores that the regulations provide that an outside salesman is an employee with the primary duty of "*making* sales," not helping others to make sales. Petitioners, however, do not themselves cause any "disposition" of respondent's products.

The Ninth Circuit also erred in crafting a unique definition of "sales" tailored to the special circumstances of the pharmaceutical industry. That approach cannot be reconciled with the Secretary's regulations, which straightforwardly look to the employee's duties. The uncontested fact that detailers are prohibited from themselves making sales resolves this case in petitioners' favor under the regulations.

II. To the extent that the regulations are ambiguous, the Department's interpretation is controlling. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). The relevant agency guidance includes several reasoned *amicus* briefs explaining that the Department reads the Secretary's regulations to provide that detailers are not exempt outside salesmen.

For the reasons discussed above, the agency's interpretation of the regulations is by far the best one. But it is at the very least a permissible reading of the regulations. The agency's interpretation tracks the ordinary meaning of the phrase "making sales" and reasonably treats drug detailing as a form of promotion, not selling. Manifestly, that conclusion is not precluded by the regulations.

The Ninth Circuit reasoned to the contrary that the Secretary's regulations merely parrot the FLSA, so that the regulations create no ambiguity for the Department to resolve. That is plainly wrong. The regulations elaborate substantially on the statute by distinguishing exempt work making sales from non-exempt promotional work that aids sales by others. In addition, the regulations require a sale to involve a transfer of title to the employer's goods. Those elaborations on the statute are eminently reasonable and preclude extending the exemption to the petitioners in this case.

III. In any event, the Ninth Circuit erred by refusing to accord substantial weight to the Department's views under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The court of appeals believed that the agency's guidance was contrary to *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941). But even assuming that it was appropriate to give a single old appellate decision such weight, the essential facts in *Jewel Tea* were that the employees in that case were "primarily employed to effect sales of the Company's merchandise" and had the responsibility to "take orders." *Id.* at 208, 205. That is of course not true of detailers.

Nor is there merit to the court of appeals' view that the Department acquiesced in the pharmaceutical industry's position that detailers are exempt outside salesmen. The Department never spoke to the status of detailers before announcing its interpretation that they do not fall within the statutory exemption. Nor does that view amount to a reversal of its prior position. The agency's longstanding position has been that employees who engage in promotional work to support sales by others are not "outside salesmen." In any event, a pattern of agency inaction is not sufficient to avoid application of the FLSA. *See* 29 U.S.C. § 259. The responsibilities of detailers have also changed substantially. But even if that were not so, the Department would be perfectly entitled to change its views, both as a basic principle of administrative law and also in response to the congressional directive to address the scope of the overtime exemptions "from time to time." *Id.* § 213(a)(1).

The judgment accordingly should be reversed.

ARGUMENT

In deciding for itself whether detailers are "outside salesmen," the Ninth Circuit usurped the role that Congress assigned to the Department of Labor, rather than performing a court's limited role of reviewing the agency's exercise of its delegated interpretive authority. The court of appeals should have recognized that the Secretary's regulations by their terms establish that petitioners are not outside salesmen because detailers do not "mak[e] sales" but instead "promote" sales that are consummated by other GSK employees. *See* Part I, *infra*. If there is room for any doubt regarding the meaning of the regulations, the Ninth Circuit should have recognized that the Department's interpretation of its own regulations is either entitled to controlling weight, *see* Part II, *infra*, or persuasive, *see* Part III, *infra*.

I. Under *Chevron*, The Department Of Labor's Regulations Are Binding And Determine The Outcome Of This Case.

The FLSA generally requires employers to pay their employees overtime wages for time spent working beyond forty hours a week. 29 U.S.C. § 207(a). The statute exempts certain categories of employees, including an "outside salesman." *Id.* § 213(a)(1). The statute directs the Secretary of Labor to "define[] and delimit[]" those exemptions "from time to time by regulations." *Id.*

Pursuant to that congressional directive, the Secretary has adopted regulations by notice-and-comment rulemaking. The regulations specify that an "outside salesman" is an employee with the "primary duty" of "making sales within the meaning of Section 3(k) of the [FLSA]." 29 C.F.R. § 541.500(a)(1)(i). The regulations further specify that "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." *Id.* § 541.503(a). The regulations reiterate that "[p]romotional activities directed towards consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." *Id.* § 541.503(b).

The regulations clearly establish that pharmaceutical detailers are not "outside salesmen." At the very least, that is the better reading.

A. The Department's Regulations Are Valid And Establish That Detailers Are Not "Outside Salesmen" Because They Engage In Promotional Work In Support Of Sales By Other Employees.

1. As legislative rules issued pursuant to a specific congressional directive, 29 U.S.C. § 213(a)(1), the Secretary's regulations are entitled to "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). Respondent does not contend that the Secretary's regulations are invalid in providing that an employee is not an exempt "outside salesman" if his primary duty is "promotional work" that furthers sales by someone else. 29 C.F.R. § 541.503(a), (b). Nor does respondent contend that the Secretary lacked the authority to provide by regulation that employees like detailers are not "outside salesmen." Respondent instead disputes the meaning of the regulations.

Respondent's determination not to challenge the validity of the regulations is sound. In directing the Secretary to enact regulations "defin[ing] and delimit[ing]" the outside sales exemption, 29 U.S.C. § 213(a)(1), Congress necessarily recognized that the phrase "outside salesman" could have different meanings. Of course, the language of the exemption is not so capacious that it could carry whatever meaning the Secretary poured into it. Words have meaning, so the exemption presumably only reaches employees who play some role "outside" the business's offices and who contribute to the business's "sales." Employees who are assigned to the office all day, every day, do not work "outside." And secretaries, seamstresses, stewardesses, sailors, stuntmen, and solicitors general are not "salesmen." So a regulation providing that, for example, an in-office secretary was an exempt "outside salesman" (and therefore ineligible to receive overtime) would be invalid as "manifestly contrary" to the FLSA. *Chevron*, 467 U.S. at 844.

But subject to the constraints imposed by the outer limits of the words' permissible meaning, the phrase "outside salesman" could be given a number of different interpretations with significant substantive consequences for the scope of the exemption. Conceivably, it might broadly reach all of the many kinds of employees who operate in some respect outside the office's physical business and contribute to the business's sales. The question is not presented here, but at the outer bounds of the word "sales," the exemption might even be stretched to reach employees who only engage in promotional efforts that contribute to later sales consummated by other employees.

That reading, however, is not the most natural interpretation of the statutory language. Far more plainly, the words of the exemption can be read more narrowly as the Secretary interpreted them: to require that the employee actually consummate the sale himself, either by entering into a contractual exchange between the employer and the customer or at a minimum by obtaining a commitment to purchase. The distinction drawn by the Secretary between "salesmen" who make sales and employees who instead engage in promotional work in support of sales by others is a perfectly reasonable, and therefore valid, interpretation of the statute.

The decisive point in this case is that, rather than constraining the Secretary's selection between those readings of "outside salesman," Congress gave the agency wide discretion to adopt one based on its expertise and experience.

2. The deference owed to the Secretary's regulations is at its apex here, because the Department's notice-and-comment rulemaking was "the subject of extensive public commentary for two decades," producing thousands of comments from employers, employees, and others, as well as two congressional hearings and an extensive report published by the General Accounting Office. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124-25 (Apr. 23, 2004). The Secretary gave particular attention to the question at the heart of this case: whether to relax the bright line distinguishing exempt sales from non-exempt promotional work that furthers sales by others. "Several" employer groups urged the Secretary to "eliminate the emphasis upon an employee's 'own sales,'" including because of the prevalence of "team selling." *Id.* at 22,162. Employers urged the Secretary to provide instead that "promotional activities, even when they do not culminate in an individual sale are, nonetheless, an integral part of the sales process." *Id.* (position expressed by the U.S. Chamber of Commerce). But the Secretary declined to do so, explaining that "[e]xtending the outside sales exemption to include all promotion work,

whether or not connected to an employee's own sales, would contradict [the regulation's] primary duty test." *Id.* That extensive process typifies reasoned agency decision making, and thus merits deference. *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001).

3. Under the Secretary's regulations, detailers are not outside salesmen. It is undisputed that detailers promote products sold by other employees; they never themselves arrange to transfer the title to pharmaceutical products to any purchaser or secure a commitment to purchase. Detailers do not interact with the company's purchasers. Pharmaceutical manufacturers instead have other employees who negotiate for the sale of drugs to a wholesaler, which then sells the drugs to pharmacy companies. Pharmacies, in turn, sell them to patients who have a prescription. *See In re Novartis Wage and Hour Litigation*, 611 F.3d 141, 153-54 (2d Cir. 2010).

A detailer's job, by contrast, is to encourage physicians to prescribe particular products. *Novartis*, 611 F.3d at 154. Physicians are not customers; they are professionals who exercise their own judgment and discretion in deciding whether to prescribe a particular medicine to a specific patient. The patient then exercises an additional layer of discretion when deciding whether to fill the prescription. *See* USA Today, Kaiser Family Foundation, & Harvard School of Public Health, *The Public Perception on Prescription Drugs and Pharmaceutical Companies* 3 (2008), *available at* http://www.kff.org/kaiserpolls/upload/7748.pdf (finding 29 percent of adults have not filled a prescription within the past two years). Most detailing visits produce no "commitment" of any kind. But any commitment that a detailer does elicit from physicians is not a commitment to buy a product. A detailer might secure the prescriber's agreement to review certain literature or attend a meeting. The most that a detailer would ever request or obtain is a nonbinding statement that the physician will consider prescribing the product in the appropriate case. For the physician to provide and the detailer to solicit more would violate both the canons of medical ethics and the industry's regime of self-regulation. *See supra* at 5-6. There is accordingly never any assurance that the physician will actually prescribe the drug, or that the patient will actually fill the prescription. In fact, "a physician might answer affirmatively just to get the [detailer] out the door." *Novartis*, 611 F.3d at 145. Even if the physician does later prescribe the promoted drug, there is no guarantee that the patient will fill the prescription. These facts expose the "nonbinding commitment" on which the Ninth Circuit relied for what it is: an oxymoron, and certainly not a "sale" for purposes of the Secretary's "outside salesman" regulation.

This Court adopted precisely this understanding of the role of detailers last Term in No. 10-79, *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). In that case, the state of Vermont argued that a restriction on the use of prescription-history records for detailing did not implicate the First Amendment because detailers effectively engage in a commercial transaction with physicians. The pharmaceutical trade association (PhRMA), a respondent in the case, argued to the contrary that the role of detailers was instead to provide "a fair balance between information about the drug's efficacy and about its safety." Br. for Respondent PhRMA at 10, *Sorrell*, 131 S. Ct. 2653 (No. 10-779) (internal quotation marks omitted). With regard to sales, PhRMA stressed that "[p]harmaceutical representatives do not haggle with doctors over price, and the doctor does not consume the drug but instead receives medical information relevant to courses of treatment for her patients. Representatives convey scientific and medical information about life-saving and life-enhancing drugs . . . ." *Id.* at 46. PhRMA explained that a variety of other factors completely external to a pharmaceutical company's promotion also influence prescribing decisions: physicians are influenced by *Consumer Reports* and other periodicals; opposition groups; and counter-detailers and registered pharmacists who aggressively promote generic drugs. *Id.* at 40-44. Moreover, physicians' prescribing patterns are affected by patient idiosyncrasies, a lack of medicinal alternatives, generic substitution laws, and the limitations imposed by insurance formularies. *Id.* at 52-54.

This Court agreed. Rejecting the state's view that the statute was "mere commercial regulation," 131 S. Ct. at 2664-65, the Court ruled that detailers' "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment," *id.* at 2659. The state's regulation, the Court explained, "disfavors marketing" and indeed "specific speakers, namely pharmaceutical manufacturers." *Id.* at 2663. The fact that "the burdened speech results from an economic motive" did not convert it into "conduct" that could be regulated as a commercial transaction. *Id.* at 2664-65.

4. To the extent that ambiguity remains, the Secretary's regulations are properly construed to limit the scope of the statutory exemption from overtime. Given Congress's intention to limit excessive work burdens and to spread available employment across the workforce, exemptions from overtime pay are to be "narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit." *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). "To extend an exemption to anyone other than those plainly and unmistakably within its terms, is to abuse the interpretative process and frustrate the announced will of the people." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The narrower reading of the Secretary's regulations under which petitioners are not exempt "outside salesmen" is thus the correct one.

It is therefore not surprising that the Ninth Circuit's decision is contrary to the reasoning of every circuit court that has construed the Secretary's promotion regulation and its predecessors. *See Novartis*, 611 F.3d at 153-55; *Clements v. Serco, Inc.*, 530 F.3d 1224, 1227-28 (10th Cir. 2008) (according deference to DOL regulations under which college recruiters who promoted enrollment but did not obtain commitments to enroll were deemed not exempt as outside salesmen); *Gregory v. First Title of Am., Inc.*, 555 F.3d 1300, 1310 (11th Cir. 2009) (exemption applied where employee "did not 'pave the way' for another salesperson to consummate the sale, but rather obtained the orders herself. And once the orders were obtained, the sale was complete."); *Wirtz v. Keystone Readers Serv., Inc.*, 418 F.2d 253, 260-61 (5th Cir. 1969) ("student salesmen" were not exempt outside sales employees where their promotional activities facilitated others taking orders).

B. The Ninth Circuit Erred In Failing To Recognize That The Secretary's Regulations Establish That Detailers Are Not "Outside Salesmen."

The court of appeals did not explicitly consider whether the Secretary's regulations determine the outcome of this case. Instead, it erroneously proceeded directly to consider "what, if any, deference we must accord" to "the Secretary's current interpretation of the regulations." Pet. App. 16a. The court did recognize that the Secretary's regulations draw a "distinction between selling and promoting." *Id.* 31a. But it concluded that this distinction "is only meaningful if the employee does not engage in *any* activities that constitute 'selling' under the Act." *Id.* The court reasoned that detailers in fact do engage in "sales" as that term is used in the regulations. That rationale is insupportable.

1. *The Ninth Circuit erred in adopting a "broad" reading of "sale" that encompassed the promotional work of detailers.*

a. The Ninth Circuit found it significant that the Secretary's regulations provide, *inter alia*, that an employee may be an outside salesman if his primary duty is "making sales within the meaning of section 3(k)" of the FLSA. 29 C.F.R. § 541.500(a)(1). In turn, Section 3(k) of the Act states that "'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale or other disposition." 29 U.S.C. § 203(k). Applying these provisions, the Ninth Circuit accepted respondent's argument that it should adopt a "commonsensical" and "permissive" reading under which "the phrase 'other disposition' in Section 3(k)'s definition of 'sale' is a broad catch-all category." Pet. App. 52a.

The Ninth Circuit erred in multiple respects. The court considered only the meaning of "sales" in isolation, ignoring the other provisions of the Secretary's regulations that preclude the court's interpretation of Section 3(k). Most important, the regulations explicitly distinguish "making sales" from "promotional work" that is "incidental to sales made or to be made by someone else." 29 C.F.R. *§§ 541.503(a), (b). The activities of a detailer are* much more naturally characterized as non-exempt "promotional work" under the regulations.

The court of appeals disagreed only by characterizing "promotional work" as being limited to marketing that is "directed to the public at large, as opposed to a particular client." Pet. App. 32a. But that limitation appears nowhere in the regulations. An employee obviously can "promote" a product to just one individual, rather than only the public at large. And the Secretary's regulations contemplate just that meaning, by providing that promotional work is "exempt" if it supports the "employee's own outside sales" but is "not exempt" if it is instead "incidental to sales made; or to be made, by someone else." 29 C.F.R. § 541.503(a). By their terms, the regulations thus contemplate one-on-one "promotion" by both exempt outside salesmen and non-exempt employees, but limit the exemption to employees who consummate sales.

No less important, the Secretary's regulations provide that an employee is an outside salesman if his primary occupation is "*making* sales." 29 C.F.R. § 541.501(a)(1) (emphasis added). Although the court of appeals considered the statutory definition of "sales" in Section 3(k), it ignored the regulatory requirement that the employee himself "mak[e]" the sale in question. To "make" is "[t]o cause (something) to exist." Black's Law Dictionary 967 (7th ed. 1999). The "disposition" of GSK's products is "made" by other employees – not by detailers, who merely provide information and seek non-binding commitments.

Relatedly, in elaborating on the requirement that *exempt employees have the primary duty of making* sales, the regulations provide: "Sales within the meaning of section 3(k) include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). Detailers fall outside this definition because they are not directly involved in any part of the "transfer of title" to the pharmaceutical company's property.

Further, the Ninth Circuit's reading is unpersuasive because the phrase "other disposition" is not as "open-ended" as the court of appeals thought. A "disposition" involves a transfer of the right to a good or service. *See* Black's Law Dictionary 484 (7th ed. 1999) (a disposition is "[t]he act of transferring something to another's care or possession, esp. by deed or will; the relinquishing of property"). The court of appeals was therefore wrong to conclude that this phrase might encompass a "non-binding commitment," Pet. App. 26a, a concept that is a contradiction in terms, and certainly not a "transfer" of property.

The same conclusion follows from the fact that, as the Second Circuit has recognized, each of the other items in Section 3(k)'s definition of "sale" – "a sale, exchange, contract to sell, consignment for sale, [and] shipment for sale" – involves an agreement to transfer the good's title. *See Novartis*, 611 F.3d at 153. The phrase "other disposition" therefore is naturally read to carry the same requirement. *See Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001) ("[W]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."); *Udall v. Tallman*, 380 U.S. 1, 19 (1965) (where terms in a list including the phrase "or other disposition" all "contemplate[d] transfer of title," Secretary's reading of the phrase "or other disposition" as encompassing dispositions conveying or leading to conveyance of title was reasonable); *Weisbart & Co. v. First Nat. Bank of Dalhart, Tex.*, 568 F.2d 391, 395 (5th Cir. 1978) ("other disposition" requires transaction involving transfer of property). Indeed, the Ninth Circuit's sweeping reading of "disposition" leaves all of the other words in the list provided by Congress with no role to play.

b. The Ninth Circuit also believed that it was appropriate to adopt a broad reading of "making sales" in the regulations in light of the Department's interpretive statement in the regulatory preamble that an outside salesman must "*in some sense* make a sale." Pet. App. 25a (quoting 69 Fed. Reg. at 22,162 (quoting, in turn, Wage and Hour Division, U.S. Dep't of Labor, *"Executive, Administrative, Professional * * * Outside Salesman" Redefined, Report & Recs. of Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition* 46 (Oct. 10, 1940) [hereinafter *Stein Report*])). That reasoning is obviously flawed, because it fails to account for *all* of the agency's guidance. A court cannot embrace the interpretive guidance with which it agrees while otherwise ignoring the agency's views. Here, the Department has specifically rejected the court of appeals' interpretation of its regulations. The agency has explained that making sales requires the salesman, at a minimum, to secure a "commitment to buy" from the purchaser, 69 Fed. Reg. at 22,162, and that efforts to persuade an intermediary (such as a prescriber) to facilitate purchases by others are insufficient, U.S. Department of Labor, *Field Operations Handbook* § 22f01(e). On that basis, it has specifically concluded that pharmaceutical detailers are not "outside salesmen."

But in any event, the operative language in the guidance the Ninth Circuit did discuss is not "in some sense" but "*making sales*," which as noted requires the employee to produce a disposition in legal title and excludes promotion. In denying that result, the court of appeals took a snippet from the regulatory preamble out of context. The Department actually stated:

> An employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales.

> [*S*]*ee* 1940 *Stein Report* at 46 (outside sales exemption does not apply to an employee "who does not *in some sense* make a sale") (emphasis added). Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test.

69 Fed. Reg. at 22,162. The *Stein Report* in which the "in some sense" language originally appeared further specifies (at 47) that "sales promotion and missionary men" are excluded from the category of "outside salesmen."

2. *The characteristics of the pharmaceutical industry do not justify the conclusion that detailers "make sales" under the Secretary's regulations.*

Applying its "broad" reading of "sell," the Ninth Circuit opined that, because "federal law prohibits pharmaceutical manufacturers from directly selling prescription medications to patients" and because "the patient is not at liberty to choose personally which prescription pharmaceutical he desires," the relevant "'sale' is the exchange of non-binding commitments between the [detailer] and physician at the end of a successful call." Pet. App. 25-26a.

It is uncontested that pharmaceutical companies do have employees who engage in sales to pharmaceutical wholesalers; the job of detailers is different. The dispositive fact is thus that the Secretary's regulations look to the "primary duty" of the employee, not the vagaries of each industry. *See* 29 C.F.R. § 541.500(b); *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 714 (1986). Relatedly, in applying the FLSA, this Court has held that industry custom and practice do not circumscribe employees' rights under the FLSA. *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981) ("The Fair Labor Standards Act was not designed to codify or perpetuate [industry] customs and contracts. . . . Congress intended, instead, to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act") (alterations in original) (citation omitted); *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 710 (1945) (noting "Congressional policy of uniformity in the application of the provisions of the Act to all employers subject thereto") *id.* at 710 n.25 ("There are to be no differentials . . . between industries, or between employers.") (quoting H.R. Rep. No. 75-2182, at 6-7 (1938) (internal quotation marks omitted)); *cf. United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (*Skidmore* deference may be warranted "given the value of uniformity in [agency's] administrative and judicial understandings of what a national law requires") (citations omitted); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 132 (1943) ("The nature of the employer's business is not determinative, because as we have repeatedly said, the application of the Act depends upon the character of the employees' activities").

The Ninth Circuit also erred in concluding that its decision was supported by the fact that a portion of some detailers' pay resembles "commissions." Pet. App. 36a. That is not a relevant consideration under the Secretary's regulations. The regulations exempt those "outside salesmen" who do not receive commissions; conversely, non-salesmen remain non-exempt even to the extent that they do receive commissions.

Moreover, the incentive pay that GSK at one time offered to detailers based on the number of prescriptions for a particular drug in that detailer's assigned territory was not a "commission" as that term is ordinarily understood. A "commission" is a "percentage of the money received from a total paid to the agent responsible for business." Webster's New Collegiate Dictionary 224 (1979). Detailers never received payments directly tied to their success in persuading the physicians they visited. Instead, the additional payments were measured by the total prescriptions filled in the territory covered by the detailer, irrespective of whether a prescription resulted from an interaction between the detailer and a physician. Any company might decide to pay its marketing staff in the same fashion, yet that fact would not convert those employees into exempt "outside salesmen." Furthermore, GSK has altered its compensation policy to drop prescriptions from compensation evaluations and replace them with a measure of how well detailers adhere "to the company values of transparency, integrity, respect and patient-focus." Matthew Arnold, *GSK Revamps Rep Pay*, Medical Marketing & Media, July 5, 2011, http://www.mmm-online.com/GSK-revamps-rep-pay/article/206820/.

The Ninth Circuit's contrary position is not materially supported by its citation to the Department's *Dictionary of Occupational Titles*, which stated that a pharmaceutical detailer, *inter alia*, "[p]romotes use of and sells ethical drugs and other pharmaceutical products" and "[p]romotes and sells other drugs and medicines manufactured by company." U.S. Dep't of Labor, *Dictionary of Occupational Titles* § 262.157-010 (4th ed. 1991). The *Dictionary* – which was last updated two decades ago and has since been superseded by the Department's "O*Net," *available at* http://www.bls.gov/opub/ooq/1999/Spring/art01.pdf – does not purport to use the word "sell" in the same manner as the Secretary's "outside salesman" regulations. To the contrary, it specifies that "the occupational information in this edition cannot be regarded as determining standards for any aspect of the employer-employee relationship," and "should not be considered a judicial or legislative standard for wages, hours, or other contractual or bargaining elements." *Dictionary of Occupational Titles* at xiii.

In sum, the Secretary's regulations by their terms establish that detailers are not exempt "outside salesmen" because their primary duty is not "making sales" but instead promotional work that aids sales by others.

II. Under *Auer*, The Agency's Interpretation Of Its Regulations As Providing That Detailers Are Not Exempt Outside Salesmen Is Controlling.

Even if the Secretary's regulations do not unambiguously resolve this case in petitioners' favor, the Department of Labor has interpreted the regulations to do so. The Department has filed five *amicus curiae* briefs in the lower courts concluding on the basis of its regulations and prior guidance that pharmaceutical detailers are not exempt "outside salesmen." In this case, the Department explained that the regulations "represent the considered judgment of the Secretary that promotional work which does not involve any actual sales does not qualify for the outside sales exemption." DOL C.A. Br. in Sup't of En Banc Review 8. As applied to this case, the Secretary found it dispositive that detailers "do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe GSK drugs to their patients when appropriate." DOL C.A. *Amicus* Br. 9. "Insofar as the Reps' work increases GSK sales, it is non-exempt promotional work 'designed to stimulate sales that will be made by someone else.'" *Id.* at 10 (quoting 29 C.F.R. § 541.503(b)). *See also* Br. for the Secretary of Labor as *Amicus-Curiae* in Support of Plaintiffs-Appellants, *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. July 6, 2010) (No. 09-0437) (arguing that the district court erred in ruling detailers exempt as outside salesperson contrary to the Department's regulations); Br. for the Secretary of Labor as *Amicus-Curiae* in Support of Plaintiff-Appellant, *Schaefer-LaRose v. Eli Lilly and Co.*, No. 10-3855 (7th Cir. May 31, 2011) (same); Br. for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellee, *Harris v. Auxilium Pharm. Inc.*, No. 11-20151 (5th Cir. July 18, 2011) (arguing that district court was correct to conclude that detailer was not an exempt outside salesperson).

The *amicus* briefs do not rely solely on the Secretary's regulations, but also on other interpretive guidance provided by the Department. The preamble to the regulations specifies that a "sale" requires a "*commitment*" from the purchaser: "Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (quoting *Weiss Report* at 83); *see also id.* at 22,162-63 ("In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." (quoting *Weiss Report* at 83)).

Further, the Department's Field Operations Handbook – the "operations manual that provides Wage and Hour Division (WHD) investigators and staff with interpretations of statutory provisions, procedures for conducting investigations, and general administrative guidance," U.S. Department of Labor, *Field Operations Handbook*, http://www.dol.gov/whd/FOH (last revised Mar. 9, 2011) – provides that "[s]oliciting business through a dealer or merchant to offer a product or service to a customer is not a sale within the meaning of 29 U.S.C. § 203(k)." U.S. Department of Labor, *Field Operations Handbook* § 22f01(e) (2010); *see also Weiss Report* at 83 ("[P]romotional activities designed to stimulate sales which will be made by someone else" are "non-exempt"; if a manufacturer sells through a wholesaler, promotion directly to a retailer "is not incidental to sales by himself and is non-exempt work," no matter how essential to the retailer's purchasing decision).

The Department's interpretation easily resolves this case.

A. This Is A Classic Case For Deference Under *Auer*.

The Department's interpretation of its own regulations is binding unless "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989)); *see also, e.g.*, *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2009) (where "an agency's course of action indicates that the interpretation of its own regulation reflects its considered views . . . [the Court has] accepted that interpretation as the agency's own, even if the agency set those views forth in a legal brief"). The agency's interpretation easily satisfies that lenient standard.

1. The Department of Labor's view – that the distinction between exempt work "making sales" and non-exempt promotion requires that an outside salesman actually effect, or at least initiate, a transfer of title over the product – is manifestly valid. It tracks the ordinary meaning of "sale." *See, e.g.*, *Comm'r of Internal Revenue v. Brown*, 380 U.S. 563, 571 (1965) ("[a] sale, in the ordinary sense of the word, is a transfer of property for a fixed price in money or its equivalent . . . it is a contract to pass rights of property for money, –which the buyer pays or promises to pay to the seller") (citations and internal quotations marks omitted); *Bus. Edge Grp. v. Champion Mortg. Co.*, 519 F.3d 150, 155 (3d Cir. 2008); *MacDonald v. Comm'r*, 76 F.2d 513, 514 (2d Cir. 1935); Opinion Letter from the Wage & Hour

Div., U.S. Dep't of Labor, 2005 WL 330605 at *2 (Jan. 7, 2005) ("Though the term sale does not always have a fixed or invariable meaning, it is generally held to be a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold.") (internal quotation marks omitted) (construing 29 U.S.C. § 203(k)).

GSK's own repeated claims that detailers do not engage in "sales" establish that the Secretary's interpretation is, at the very least, reasonable. In a motion to dismiss a products liability action, GSK stated that, "[a]s a GSK sales representative, [the detailer's] primary job responsibility was to provide information regarding the risks and benefits of select pharmaceutical products to health care providers in his assigned geographic territory. . . . During the course of his employment with GSK, [the detailer] never designed, tested, manufactured, marketed, sold, distributed, or supplied [any GSK product]." Def.'s Mot. to Dismiss at 5, *Faulk v. SmithKline Beecham Corp.*, No. 2:05CV85-F (M.D. Ala. Sept. 7, 2005).

Although its job description for detailers sometimes references "sales," GSK explained that "all the job description does is show that GSK seeks to hire qualified, well-educated individuals." J.A. 157a. GSK reaffirmed this position in a motion filed in a separate products liability case, in which it argued that "[t]here is no possibility that Plaintiffs could prevail on their warranty claims against [the detailer] because she is not a supplier or seller of [GSK products]." Def.'s Br. in Opp'n to Pls.' Mot. to Remand to State Ct. at 9, *Martinez v. SmithKline*

Beecham Corp., No. 2:08-cv-05847 (E.D. Pa. July 28, 2009).

To the extent the question is at all close, the Department's position is faithful to the principle that exemptions should be "narrowly construed," *Ben Kanowsky*, 361 U.S. at 392, and applied only when they are "plainly and unmistakably" implicated, *A.H. Phillips*, 324 U.S. at 493.

2. This is a classic context for deferring to the judgment of an administrative agency, as *Auer* (which involved the Department's interpretation of the FLSA) illustrates. Congress created the Department of Labor precisely in order to administer the nation's labor laws, particularly the FLSA. The United States is a vast, complicated labor market with more than six million employers, and a workforce that exceeds 125 million people in many thousands of different job categories. Tasked with the depth and breadth of such a daunting assignment, the agency itself employs thousands of individuals who work full time to collectively assess the labor market, including with respect to questions of overtime eligibility.

Having created the Department to do this job, Congress expected the agency to develop and apply at least three relevant forms of expertise. First, Congress recognized that the Department would develop a considerable body of knowledge about the many different kinds of job categories that might be regarded as "outside salesmen." Because so many jobs involve some form of promotional work and bear some relationship to the employer's "sales," there can be hundreds of jobs that approach the margins of the statutory exemption. Pharmaceutical detailer is just one of many. In everyday experience, we encounter individuals who hand out flyers on the street about ongoing sales, representatives of cosmetic companies who offer to spray samples of perfume in department stores, and employees of producers who visit stores to offer samples of, for example, wines. Congress necessarily understood that this body of experience would put the agency in the best position to determine which job categories merit exemption from overtime pay.

Second, and relatedly, Congress understood that the Department could account for changing labor conditions and job responsibilities. It thus directed the Secretary to promulgate regulations interpreting the outside salesman exemption not just once, but "from time to time." 29 U.S.C. § 213(a)(1). Many new industries have been created and others have disappeared outright in the more than seven decades since Congress enacted the FLSA. In some instances, Congress has amended the statute directly to address its reach. But in this instance, it has entrusted to the Secretary the responsibility of adopting and interpreting rules that best account for changed circumstances.

Third, and more broadly, the agency has considerable experience with the benefits and disadvantages of certain kinds of rules. Here, for example, there are significant implications to the choice between a single bright-line definition of "outside salesman" and an alternative approach that provides that the term should be adapted to the circumstances of particular industries. The former provides clarity, allows the parties to the employment relationship to negotiate the terms and conditions of employment in advance, and reduces the amount of litigation over the rule's meaning. Congress thus granted the Secretary authority to define the overtime exemptions to "enable persons to know definitely whether or not they are to be subject to the law," given that "[r]easonable men may differ as to whether a particular employee is included or excluded." 83 Cong. Rec. 7281 (1938) (statement of Cong. Norton). The latter may have the benefit of more completely encompassing the employees that the employer regards as part of its "sales force." Having implemented, interpreted, and enforced hundreds of regulations relating to wages, the Department would be well positioned to make a judgment regarding what type of rule best effectuates the FLSA's purposes.

The Department was properly guided by the principle that the determination whether work triggers the FLSA's overtime pay requirements requires a clear, administrable standard. The Department cannot possibly police every industry and every application of the outside sales exemption across this country. Instead, it must announce generally applicable principles. Any bright-line rule can be argued to be over- or underinclusive when applied to some subsets of the innumerable types of diverse American workplaces. But that presents no substantial problem because a clear rule permits employers and employees *ex ante* to confidently establish job duties and negotiate an appropriate wage and workweek.

After extensive public input, the Secretary thus wisely chose to adopt a reasonable, simple, and administrable interpretation of "outside salesman."

In the notice-and-comment process, employers complained that the Department's previous standards were "confusing and applied inconsistently by the Wage and Hour Division," and that "the traditional limits of the exemptions have blurred in the modern workplace." 69 Fed. Reg. at 22,124-25. The General Accounting Office therefore urged the Secretary to be attentive to "employers' desires for clear and unambiguous regulatory standards." *Id.* at 22,125. The Secretary's regulations accordingly draw a bright line between making sales and promotion that aids sales made by others. Under that standard, pharmaceutical detailers are subject to the ordinary rule that they receive overtime compensation for work beyond forty hours a week. 29 U.S.C. § 207(a). To the extent that employers such as respondent believe that petitioners' wages are too high, they can and will limit the hours in detailers' workweeks and/or seek to negotiate a lower base wage.

By contrast, a rule that the meaning of "making sales" varies according to the conditions of particular industries would create uncertainty and unnecessarily embroil the Department and the courts in still more cases like this one over the FLSA's application to innumerable individual workplaces. The decision below aptly illustrates the point. The Ninth Circuit dismissed the Department's interpretation as "a rigid, formalistic interpretation," Pet. App. 28a, preferring a rule under which employees who "lack some hallmarks of the classic salesman" are nevertheless "outside salesmen" so long as "the great bulk of their activities are the same," *id.* 30a-31a. But the court of appeals offered no guidance on how the tens of thousands of businesses that employ millions of workers in some sales-related capacity could possibly know in advance how its "great bulk" standard would be applied by the Department of Labor in an enforcement action or by a court in a FLSA suit for overtime wages. The standard adopted by the Ninth Circuit would inevitably breed great uncertainty and confusion.

3. Courts lack each of the three characteristics that led Congress to give the Department of Labor the authority to define and delimit the meaning of "outside salesman." No member of the Ninth Circuit spent a career studying the labor markets and developing rules for their orderly administration, much less a career undertaken on the basis of a congressional assignment to develop a special expertise in that field. And the court of appeals announced a rule that would apply for time immemorial, ejecting the Department from its assigned role as the expert agency tasked with responding to changes in labor conditions. In rejecting the Department's categorical interpretation of "outside salesman" in favor of a special rule applicable only to the pharmaceutical industry, the Ninth Circuit also disrupted a regime under which employers and employees can confidently use the existence of a bright-line rule to establish job responsibilities, and negotiate salaries and work hours, all in advance.

Congress trusted the Department to make this choice because it is good at its job, not just because of the agency's expertise but also because of its accountability. If the Secretary of Labor interprets "outside salesman" in a manner that the President finds objectionable, he can replace the Secretary. The

President is elected by the public; if the public disagrees with the President's choice, it can decline to re-elect him. The Department is also subject to a thorough process of congressional oversight, as is perfectly illustrated by the congressional hearings relating to these very regulations. The Secretary has every incentive to apply her expertise in the light of the experience and judgment of the agency staff to get the question right.

By determining that it preferred a broad reading of "outside salesman" that it claimed accounted for the peculiar characteristics of the pharmaceutical industry and enacting that preference into law, the Ninth Circuit was accountable to no one (absent review in this Court). Despite the fact that the people elected Congress, which in turn assigned this responsibility to an expert agency within the politically accountable executive branch, the court of appeals took upon itself the role of making a policy judgment about how many kinds of employees should be exempt from overtime.

The point is not, of course, that the public selects members of Congress or the President based solely on their views on the outside sales exemption. For most of the country, there are more pressing issues. But the principle of administrative law at stake in this case is just as applicable to thousands of other regulations issued by dozens of agencies, which collectively play a significant role in defining our polity. If agency judgments are overridden with regularity by generalist courts, then there will be little reason for the public to hold the executive accountable and less reason for agencies to take their responsibilities so seriously.

In this respect, the Ninth Circuit's decision also fails to recognize the trajectory of this Court's jurisprudence discouraging regulation through litigation. In many cases, plaintiffs are the parties who seek to have disputes resolved by courts rather than expert agencies. But here it is the reverse. Petitioners respect the judgment of the Department of Labor. Respondent, by contrast, imagines a regime in which employers and employees will call on the federal courts to resolve their disputes over the proper categorization of innumerable jobs.

B. The Ninth Circuit Erred In Refusing To Defer To The Department's Interpretation On The Ground That The Regulations Merely Parrot The Statutory Text.

The Ninth Circuit held that the Secretary's regulations are not binding on the ground that the Secretary's regulation "clarifies nothing about the meaning of Section 3(k)" because it "cross-references back to the language of Section 3(k)." Pet. App. 22a. On that view, this case is governed by the holding of *Gonzales v. Oregon* that the Attorney General's interpretation of a regulation was not binding because "'the underlying regulation does little more than restate the terms of the statute itself.'" *Id.* 23a (quoting 546 U.S. 243, 256-57 (2006)).

The Ninth Circuit erred because the Secretary's regulations do substantially more than "restate" the terms of Section 3(k). As noted, the regulations provide that the outside salesman must "mak[e]" the sale. They also clarify the meaning of Section 3(k) by providing that a "sale" involves the "transfer of title" of property. The regulation thus properly clarifies that the exemption focuses on actual sales transactions consummated by the employee in question, as opposed to some other more tangential part of the process that one might characterize as "making sales" on the broadest possible reading. No less important, the Secretary distinguished "making sales" from "promotional work" that aids made sales by others. 29 C.F.R. § 541.503(a). That regulation "delimit[s]" the category of "outside salesman," 29 U.S.C. § 213(a)(1), and does so without parroting the text of the FLSA.

This case is accordingly easily distinguished from *Gonzales v. Oregon*, in which this Court rejected the Attorney General's claim that he could issue a legally binding interpretation of a regulation under *Auer* despite the absence of any relevant "difference between the statutory and regulatory language." 546 U.S. at 257. "Since the regulation gives no indication how to decide this issue, the Attorney General's effort to decide it now cannot be considered an interpretation of the regulation." *Id.*

The relevant part of *Gonzales* is instead its reiteration of *Auer*'s holding, which governs this case. Courts must give binding effect to the Department of Labor's interpretation of regulations that provide "specificity to a statutory scheme the Secretary [is] charged with enforcing and reflected the considerable experience and expertise the Department of Labor ha[s] acquired over time with respect to the complexities of the Fair Labor Standards Act." *Gonzales*, 546 U.S. at 256-57.

Gonzales is also distinguishable on the ground that the "agency" in that case (the United States

Attorney General) had no delegated authority from Congress to issue the rule in question. That rule moreover was an interpretive rule, not one issued pursuant to notice and comment (unlike the Secretary's regulations interpreting the outside salesman exemption). *Id.* at 253-54, 258-68.

The Department was accordingly empowered to reasonably interpret the distinction between "promotional work" and "making sales" – which was entirely a "creature of the Secretary's own regulations," *Auer*, 519 U.S. at 461 – to provide that pharmaceutical detailers are not outside salesmen because they engage in non-exempt promotion.

III. Under *Skidmore*, The Ninth Circuit Erred In Finding The Secretary's Interpretation Of The "Outside Salesman" Exemption Unpersuasive.

Even assuming that neither the Secretary's regulations nor the Department's interpretation of those regulations binds the courts in the disposition of this case, the agency's interpretation should be accorded deference on the ground that it is persuasive. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). However, having concluded that it was not bound by the "agency-determined result" that pharmaceutical detailers are not "outside salesmen," the Ninth Circuit concluded that the Secretary's interpretation was not persuasive and on that basis refused to "accord [it] even minimal *Skidmore* deference." Pet. App. 34a. The Ninth Circuit gave two reasons for deeming the Department's reasoning unpersuasive and for refusing to give any weight to the views of the expert agency charged by Congress with administering the FLSA. Both were mistaken.

1. The court of appeals mistakenly believed that its contrary holding was supported by *Jewel Tea Co. v. Williams*, 118 F.2d 202 (10th Cir. 1941), which it regarded as "the paradigm 'outside salesman' case." Pet. App. 28a. In *Jewel Tea*, the court held that salesmen who also performed deliveries were "outside salesmen" because they were "primarily employed to effect sales of the Company's merchandise," and several indicia (including the fact that they spent most of their time selling, and that their earnings were based on commission) suggested that they were salesmen, not merely delivery men. 118 F.2d at 208.

Assuming that a single appellate ruling from seventy years ago should play such a prominent role, the relevant point is that the employees in *Jewel Tea* (*unlike pharmaceutical detailers*) *were not* limited to promoting their employer's products but instead had the responsibility to "take orders." *Id.* at 203. The essential feature of a "sale" is a transfer of title or property; it was present in *Jewel Tea*, but it is missing here. Not surprisingly, the court that decided *Jewel Tea* has since twice reaffirmed that the exemption does not apply to employees with a primary duty that involves something less than consummating sales or obtaining concrete commitments to purchase. *See Clements v. Serco, Inc.*, 530 F.3d 1224, 1227-29 (10th Cir. 2008) (exemption inapplicable where "no 'order or contract' [or commitments to purchase] had been obtained," and employee merely paved way for another to make sale); *Ackerman v. Coca-Cola Enter., Inc.*, 179 F.3d

1260, 1267-68 (10th Cir. 1999) ("key inquiry" is whether employee "actually consummates" sales).

Thus, to the extent that the Ninth Circuit was correct in believing that *Jewel Tea* applied a "multifactor review of an employee's functions," Pet. App. 35a, the most important factor in that test is whether the employee made sales. 118 F.2d at 208. Indeed, where courts have applied a multi-factor test in construing the exemption, they have done so in examining whether, under a regulation not applicable here, the employee's "primary duty" (as opposed to an ancillary duty) is making sales – but that issue is not before this Court. *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 471-72 (S.D.N.Y. 2008) (multi-factor test was "developed to assist in the adjudication of 'mixed duties' cases" under 29 C.F.R. § 541.504(b), which governs "driver salesmen" who engage in both sales and non-sales work); *Kuzinski v. Schering Corp*, 604 F. Supp. 2d 385, 394 (D. Conn. 2009) (same), *aff'd*, 384 F. App'x 17 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1567 (2011).

2. The Ninth Circuit equally erred in believing that its position was "buttresse[d]" by the Secretary's supposed "acquiescence in the sales practices of the drug industry for over seventy years." Pet. App. 32a-33a. According to the court of appeals, until its recent *amicus* briefs, "the DOL did not challenge the conventional wisdom that detailing is the functional equivalent of selling pharmaceutical products." *Id.* 33a.

But the acquiescence imagined by the Ninth Circuit was a mirage. There is no indication that the Department of Labor previously was aware of and considered whether pharmaceutical detailers are outside salesmen.

To the extent that the Department said anything relevant, the regulations at issue in this case were enacted in 2004. Even before that, the agency's position has long been clear that employees who engage in promotional efforts are not exempt from overtime pay. Since at least 1949, the Department has taken the position that the FLSA requires an outside salesman to "obtain a commitment to buy" the product. *Weiss Report* at 83. Similarly, the Department's 1965 Field Operations Handbook provided that "[a]n employee whose duty is to convince a dealer of the value of his employer's services to the dealer's customers and who does not, in fact, obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Section 3(k)." U.S. Department of Labor, *Field Operations Handbook* § 22e04 (1965).

When asked to explain his contrary claim that detailers' promotional activities include sales, GSK's Regional Vice President conceded that detailers do not, in fact, contract for the sale of GSK's products. The most he was able to say was that "[w]hat is sold is the information – or what is promoted is the information around our product. What is sold is the notion that the physician will find it useful, that medicine, for his or her patients." J.A. 142. But it has long been settled that selling a "notion," such as donating to charity, educational recruiting, or organ donation, is not a "sale" under the exemption. *See* Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 2006 DOLWH LEXIS 65, at *5 (May 22, 2006) ("Soliciting promises of future charitable donations or 'selling the concept' of donating to charity does not constitute 'sales' for purposes of the outside sales exemption."); Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 1998 DOLWH LEXIS 17, at *7 (Feb. 19, 1998) (college recruiter not an outside salesperson where he is engaged in identifying qualified potential students, but the college decides "whether to make a contractual offer of its educational services to the applicant"); Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 1994 DOLWH LEXIS 65, at *3 (Aug. 19, 1994) ("The selling of a concept," such as donating human tissues to hospitals, "does not constitute 'sales' within the meaning of the regulations"); Opinion Letter from the Wage & Hour Div., U.S. Dep't of Labor, 1982 DOLWH LEXIS 28, at *4 (Oct. 4, 1982) (employment recruiter was not an outside salesperson where he arranged meetings between prospective employees and employers but employer made the ultimate decision whether to hire).

Just as important, in promulgating the Secretary's current regulations, the Department explained that "[a]s the workplace and structure of our economy has evolved, so, too, must [the regulations] be modernized to remain current and relevant." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,124 (Apr. 23, 2004). The Department recognized that it was charged with "utilizing record evidence submitted in 2003 * * * not in the 1940s or 1950s * * * in exercising its discretion to update the terms of this Part." *Id.* It is thus significant that the responsibilities of detailers and the regulatory restrictions on their ability to "sell" pharmaceutical products have changed substantially over the past several decades. The agency's position corresponds to the current responsibilities of detailers, including the petitioners in this case.

Fifty years ago, many detailers *were* also salesmen. These old-line "detail men" were often doctors or pharmacists, or at least had a background in science. They sold drugs to pharmacies and "physician supply houses," carried order forms, and discussed prices with buyers. Arthur F. Peterson, *Pharmaceutical Selling, 'Detailing' and Sales Training* 26-27, 31-33, 36, 94, 166-67, 189 (2d ed. 1959). Now, detailers are generally recent college graduates who, while they may have some science background, also may have as a principal qualification experience in "cheerleading." *See* Stephanie Saul, *Give Me an Rx! Cheerleaders Pep Up Drug Sales*, N.Y. Times, Nov. 28, 2005, at A1.

Moreover, even in years past, detailers recognized a clear distinction between their two roles; detailing was regarded as a form of "promotion," while "sales" were separate. George R. Cain, the president of Abbott Laboratories and a leading pharmaceutical figure of the 1960s, discussed this sales/promotion dichotomy:

> Most pharmaceutical sales representatives have a "detailing assignment" where they call upon physicians to detail products, and also a "sales assignment" where they call upon buying accounts such as drugstores and hospitals. The usual pattern for the detail man is to call upon

> his drugstores and hospital in the morning and detail his physicians in the afternoon.

George R. Cain, *The Detail Man – What the Pharmaceutical Industry Expects of Him*, 38 Bull. N.Y. Acad. Med., No. 2, Feb. 1962, at 129, *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1804767/pdf/bullnyacadmed00311-0064.pdf. But even then, many detailers of the era recognized that in their role as detailers, their job was to promote sales, not make them. *See* Thomas H. Jones, *Detailing the Physician: Sales Promotion by Personal Contact with the Medical and Allied Professions* 17 (1940) ("Detailing is in reality, sales promotion and every detail man should keep that fact constantly in mind."); Rufus L. McQuillan, *Is the Doctor In? The Story of a Drug Detail Man's 50 Years of Public Relations with Doctors and Druggists* 140 (1963) ("Every detail man is a potential missionary or a potential public relations man, as well as a professional service representative."). Courts have likewise recognized that detailers who called upon physicians were not engaged in sales. *See, e.g.*, *Kress & Owen Co. v. Comm'r of Internal Revenue*, 12 BTA 991, 992 (1928) ("The detail men who called on the profession were usually physicians themselves, they were not salesmen, but merely did missionary work to introduce and popularize the product.").

But even accepting the Ninth Circuit's premise that the Department at an earlier time acquiesced to the view that detailers were salespersons, and moreover that the responsibilities of detailers remain unchanged, the Department is fully entitled to change its views, so long as its position remains reasoned. Congress specifically contemplated that the Secretary would adopt revised regulations from "time to time." 29 U.S.C. § 213(a)(1). Even if an agency advances "a novel interpretation of its longstanding . . . regulations, novelty alone is not a reason to refuse deference." *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263-64 (2011). In the absence of a definitive and authoritative DOL pronouncement that detailers are exempt outside salesmen, it is not precluded from interpreting the exemption as excluding them. *Altria Group, Inc. v. Good*, 555 U.S. 70, 89-90 (2008) ("agency nonenforcement of a federal statute is not the same as a policy of approval").

Prior acquiescence by the Department thus does not defeat the deference due to its current interpretation. The FLSA specifically provides that employers may rely on "any written administrative regulation, order, ruling, approval, or interpretation" by the Department of Labor; inaction by the agency is insufficient. 29 U.S.C. § 259(a). The agency's regulations accordingly advise employers that "before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency." 29 C.F.R. § 790.18(h).

APPENDIX

Relevant Statutory and Regulatory Provisions

29 U.S.C. § 207(a)(1) provides:

> Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 203(k) provides:

> "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 213(a)(1) provides:

> Minimum wage and maximum hour requirements. The provisions of sections 6 (except section 6(d) in the case of paragraph (1) of this subsection) and 7 shall not apply with respect to—
>
> > (1) any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or

> secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act except than [that] an employee of a retail or service establishment shall not be excluded from the definition of employee employed in a bona fide executive or administrative capacity because of the number of hours in his workweek which he devotes to activities not directly or closely related to the performance of executive or administrative activities, if less than 40 per centum of his hours worked in the workweek are devoted to such activities)[.]

29 U.S.C. § 259(a) provides:

> Reliance in future on administrative rulings
>
> (a) In any action or proceeding based on any act or omission on or after the date of the enactment of this Act, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any

administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

29 C.F.R. § 541.500 provides:

General rule for outside sales employees.

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections,

> shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.
>
> (c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

29 C.F.R. § 541.501 provides:

> Making sales or obtaining orders.
>
> (a) Section 541.500 requires that the employee be engaged in:
>
> > (1) Making sales within the meaning of section 3(k) of the Act, or
> >
> > (2) Obtaining orders or contracts for services or for the use of facilities.
>
> (b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.
>
> (c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on

radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

29 C.F.R. § 541.503 provides:

Promotion work.

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

RESPONDENT'S BRIEF

No. 11-204

In the
Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER AND
FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM CORP. D/B/A
GLAXOSMITHKLINE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

During most of the more than 70 years since enactment of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, pharmaceutical companies have employed pharmaceutical sales representatives and, consistent with Department of Labor regulations first promulgated in 1940 and reaffirmed as recently as in 2004 defining the term "sales" broadly, classified those sales representatives as exempt from the FLSA's overtime pay requirements under the "outside sales" exemption, 29 U.S.C. § 213(a)(1). In 2009, the Department began filing *amicus* briefs in private civil litigation announcing its new position that sales representatives are not now and have never been exempt because they do not "sell" as that term is defined in Section 3(k) of the FLSA, 29 U.S.C. § 203(k). The United States Court of Appeals for the Ninth Circuit refused to defer to that abrupt change in position and held that sales representatives are exempt. The questions presented are:

(1) Whether deference is owed to the Secretary's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

PARTIES TO THE PROCEEDING

Petitioners Michael Shane Christopher and Frank Buchanan were the appellants in the court of appeals below. Respondent SmithKline Beecham Corp. d/b/a GlaxoSmithKline, now known as GlaxoSmithKline LLC, was the appellee in the court below.

RULE 29.6 STATEMENT

Respondent SmithKline Beecham Corporation, d/b/a GlaxoSmithKline, now known as GlaxoSmithKline LLC, is a wholly owned subsidiary of GlaxoSmithKline Holdings (Americas), Inc. All of Respondent's stock is owned by GlaxoSmithKline Holdings (Americas), Inc. The ultimate parent of both Respondent and GlaxoSmithKline Holdings (Americas), Inc., is GlaxoSmithKline plc, the shares of which are publicly traded on the London Stock Exchange and New York Stock Exchange. No person beneficially owns 10% or more of the outstanding shares of GlaxoSmithKline plc.

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INTRODUCTION

The Fair Labor Standards Act ("FLSA") requires employers to pay overtime compensation to certain employees who work more than 40 hours in a week. The Act includes a wide array of exemptions to that requirement, including "any employee employed ... in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). For more than 70 years, the Department of Labor ("DOL") took a flexible, pragmatic, and functional approach to the meaning of "sales" that considered the overall context in which the employee worked.

In 2009, DOL filed an uninvited *amicus* brief in which it made an abrupt about-face and asserted that there can be no sales without a formal transfer of title. As a result, DOL contends that pharmaceutical sales representatives ("PSRs") such as Petitioners are not covered by the outside salesman exemption, despite uniform industry practice treating PSRs as exempt. That novel interpretation is fundamentally unmoored from the text of the FLSA, the implementing regulations, and DOL's longstanding interpretation of those rules. The court of appeals held that DOL's new position is entitled to no deference, and that Respondent GlaxoSmithKline ("GSK") is entitled to summary judgment. That holding was plainly correct and should be affirmed.

STATEMENT OF THE CASE

A. The Fair Labor Standards Act and Outside Salesman Exemption

Enacted against the backdrop of economic crisis, massive unemployment, and oppressive labor conditions, the FLSA was intended to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). One declared objective was "to improve ... the standard of living of those who are now undernourished, poorly clad, and ill-housed." S. Rep. 75-884, at 3 (1937) (Message from President Roosevelt). Another was to "promote economic justice and security for the lowest paid of our wage earners" and to "protect this Nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and long hours of work injurious to health." S. Rep. 81-640, at 1-2 (1949).

The FLSA pursued these objectives by establishing "a few rudimentary standards" so basic that "[f]ailure to observe them [would have to] be regarded as socially and economically oppressive and unwarranted under almost any circumstance." S. Rep. 75-884, at 3. The Act therefore proscribed the use of child labor, imposed a minimum wage for most jobs, and established a general rule that individuals working more than forty hours in a given workweek were entitled to time-and-one-half pay for those additional hours.

To avoid unintended effects on individuals or industries that were not engaged in the oppressive labor practices that prompted Congress to act, Congress made the general overtime rule subject to a wide array of exemptions, exceptions, and special applications. As relevant here, the "white-collar exemption" provides that the overtime requirements do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity ... or in the capacity of outside salesman." 29 U.S.C. § 213(a)(1).

The reasons for exempting outside salesmen were "fairly apparent" from the start: Hourly standards "primarily devised for an employee on a fixed hourly wage" are incompatible with the "individual character of the work of an outside salesman" because he "works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day." *Jewel Tea v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941).

B. DOL's Regulations Interpreting the Exemption

In 1940, DOL promulgated rules providing that an "outside salesman" is an employee "[w]ho is employed for the purpose of and who is customarily and regularly engaged away from his employer's place or places of business in [m]aking sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.5(a) (1940). The current regulations are little changed, defining an "outside salesman" as one whose "primary duty" is "making sales within the meaning of section 3(k) of the Act" and "[w]ho is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a). Section 3(k), in turn, defines "sale" in broad and flexible terms to "include[ ] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). The regulations thus quite naturally define an "outside salesman" as one who operates outside the normal workplace and makes sales, as broadly defined in the statute.

Since promulgating its first regulations, DOL has emphasized the flexible, nonrestrictive manner in which Congress has defined "sales." DOL's earliest guidance explained that employees engage in exempt "sales" work whenever they "*in some sense* make a sale."[1] DOL's guidance several years later similarly noted that "[w]ith such variations in the methods of selling and promoting sales each case must be decided upon its facts" and that "the test in borderline cases is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling."[2] As recently as 2004, DOL emphasized that its approach to the outside sales exemption remained substantively the same as it was in 1940 and 1949 and that "much of the reasoning" of its earlier reports—including the notion that an employee need only make sales "in some sense"—"remains as relevant as ever."[3]

Between 1940 and 2009, consistent with the flexible definition of "sales" in Section 3(k) and the regulations, DOL applied a multi-factor, context-dependent test to determine when the outside sales exemption applies. That test considered, among other things, "the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; [and] method of payment." Stein Report 51-52; *see* Opinion Letter, 2005 WL 330605, at *2 (Jan. 7, 2005) (acknowledging that "'the term 'sale' does not always have a fixed or invariable meaning'").

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[1] DOL, "*Executive, Administrative, Professional ... Outside Salesman" Redefined: Report and Recommendation* 46 (1940) ("Stein Report") (emphasis added).

[2] DOL, *Report on Proposed Revisions of Regulations* 83 (1949) ("Weiss Report").

[3] *Defining and Delimiting the Exemptions for ... Outside Sales* [*Employees*], 69 Fed. Reg. 22,122, 22,124 (2004).

That all changed abruptly in 2009 when DOL filed an *amicus* brief in the Second Circuit in a case regarding whether PSRs employed by Novartis were covered by the exemption.[4] Without even acknowledging the departure from its longstanding interpretation of "sales," DOL made an abrupt about-face and advanced precisely the sort of fixed and invariable definition of sales that it had previously rejected.

Under DOL's new and far-more-restrictive definition, a "sale" *required* a fully "consummated transaction directly involving the employee for whom the exemption is sought." Novartis Br. 11. Because of prescription drug requirements and other regulations, *see* 21 U.S.C. § 353(b)(1) (certain drugs may be "dispensed only upon a written prescription"), the large outside sales force of the pharmaceutical industry focuses on obtaining commitments from physicians. The salesmen do not consummate the physical transfer of products to those physicians because the products are actually dispensed to patients through pharmacists based on the doctor's written prescription. According to DOL, the Novartis salesmen did not qualify for the exemption because they did not themselves "actually," irrevocably, and fully consummate any sales of Novartis products. Novartis Br. 5. The Second Circuit granted "'controlling' deference" to DOL's new interpretation of its regulations. *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 149 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

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[4] DOL Br. as *Amicus Curiae, Novartis Wage & Hour Litig.*, No. 09-4376 (Oct. 13, 2009) ("Novartis Br.").

C. Petitioners' Pharmaceutical Sales Representative Positions

Petitioners Michael Christopher and Frank Buchanan were employed by GSK as PSRs. The positions for which Petitioners applied were denominated as "sales" jobs, and Petitioners understood that GSK preferred candidates who had previous sales experience. JA 6-7, 53-54. When he applied to GSK, Buchanan was employed in a sales position at Qwest Communications. JA 206-08. And when Christopher applied, he was met with skepticism by the GSK recruiter because he lacked prior sales experience. JA 7.

GSK's job announcement identified the PSR's *first* "key responsibility" as "[s]ell[ing] products to [a] specific customer market according to the business plan." JA 170; *see* JA 85 (PSR is "[r]esponsible for sales of assigned products in assigned territory"). The customers who were the focus of PSRs' sales efforts were physicians—the only individuals authorized under federal law to write prescriptions for GSK products, and therefore the only people who could order GSK products and get them into the hands of patients with a medical need. Pet.App.2a-4a; JA 133.

Petitioners were trained in and were expected to use customer-focused selling techniques to meet or exceed the sales goals and objectives they received from GSK. JA 95-96. GSK expected them to "[d]evelop and deliver informative sales presentations based on customer needs," to "[d]evelop creative sales strategies to reach hard-to-see doctors/hard-to-work accounts," and to "[p]ositively impact sales in [their] territory." JA 171.

Once hired, Petitioners received specialized training in sales skills. JA 24, 61-63. Petitioners were trained to identify key customers; ask questions to engage customers in meaningful and appropriate discussions about GSK products; and identify and resolve objections their customers might have to prescribing GSK products. And they were trained how to "close the sale"—*i.e.*, to ask for a commitment from their customer-physicians to prescribe, where medically appropriate and consistent with product labeling, those GSK products for which the PSR was responsible. JA 56-57, 96, 194-95, 235.

On the job, Petitioners did precisely what outside salespeople are expected to do. They did not work out of a GSK office; instead, they spent their time traveling to, visiting with, and seeking commitments from their physician-customers to prescribe GSK products for appropriate patients. JA 26-28, 75-76. Before going on sales calls, they examined data regarding the prescribing habits of the doctors in their territories to see where they could gain new business or grow existing business. JA 47-48, 63-66, 72-73, 186-87, 261, 269. They targeted physicians they believed could appropriately prescribe more of the GSK products for which they were responsible, with the goal of increasing sales in their territory. JA 57-62, 72-73. Petitioners tailored their sales messages for each individual physician and asked for commitments to prescribe their assigned products for appropriate patients. JA 16, 19-23, 31-32, 57, 66-68, 70-71.

Petitioners were evaluated based on their sales techniques: their planning for each sales call; the degree to which they executed a persuasive sales presentation; and their success in "ask[ing] for the business" by seeking a commitment from physicians to prescribe, where medically appropriate, the GSK products they sold. JA 194-95, 235, 255. On supervisor "ride-alongs" (which occurred every month or two), a manager would accompany a PSR in the field in order to assess the employee's competence with respect to GSK's "Winning Practices." JA 77-79, 188-98, 258-74. Other than these ride-alongs, however, Petitioners carried out their daily work tasks independently, without any direct supervision other than a phone call or e-mail exchange with a manager roughly once a day. JA 16, 77-78.

Petitioners were also paid as salespeople. In addition to a fixed base salary, a significant portion of their total pay was contingent upon increasing sales within the territory by obtaining commitments from the physicians on whom they called to write more prescriptions for GSK products for appropriate patients. JA 29-30, 276-79. Petitioners received incentive compensation each year—which comprised between 26% and 41% of their total annual compensation—based on their success in increasing sales volume and/or market share in their territory for the specific GSK products for which they were responsible. JA 29-30, 276-79. Both GSK and Petitioners recognized that Petitioners' individual efforts led directly to sales success in their respective territories. *See* JA 174-85, 265, 274.

D. Proceedings Below

GSK terminated Christopher's employment in May 2007, after an internal investigation revealed that he had violated GSK's code of conduct by reporting that he made sales calls with physicians with whom he did not meet face-to-face. *See* Ninth Circuit Supplemental Excerpts of Record ("SER") 94-100, 200. Buchanan left GSK for a PSR position at another pharmaceutical company. Pet.App.2a. Petitioners subsequently filed a putative class action in district court claiming that GSK had improperly classified PSRs as exempt employees. Petitioners argued that because federal law prohibited them from selling GSK products directly to patients, and because the physicians on whom they called did not purchase or inventory GSK's products, PSRs were not engaged in "sales" under the FLSA. Pet.App.41a-42a.

The district court rejected that argument. Looking to the flexible definition of "sale" in section 3(k) of the FLSA—and not, as Petitioners had urged, to a dictionary definition—the court concluded that the FLSA and DOL define the term "somewhat loosely," and that an employee need only engage in a sale "in some sense" in order to be covered by the exemption. Pet.App.43a-44a. The court held that Petitioners' physician-focused sales activity undoubtedly constituted sales "in some sense"—*i.e.*, in the only sense relevant in the highly regulated pharmaceutical industry—and qualified as "sales" under Section 3(k). Indeed, the court emphasized that PSRs "obtain[] a non-binding commitment from the physician to prescribe the PSR's assigned product." Pet.App.46a. The court determined that Petitioners "plainly and unmistakably fit within the terms and spirit of the exemption," *id.*, and thus granted GSK's motion for summary judgment.

While that motion was pending, Petitioners submitted DOL's *Novartis amicus* brief as "supplemental authority." JA 3. Following entry of summary judgment, Petitioners moved to amend the judgment, arguing that the court failed to grant "controlling deference" to that brief under *Auer v. Robbins*, 519 U.S. 452 (1997). Pet.App.49a. The court denied the motion, rejecting DOL's position as an "absurdity" and concluding that "[n]ot only is the DOL's current interpretation inconsistent with the statutory language and [the Agency's] prior pronouncements, but it also defies common sense," given that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet.App.51a-52a.

Petitioners appealed to the Ninth Circuit, and DOL filed an uninvited *amicus* brief that largely tracked its *Novartis* brief. The court of appeals agreed with the district court that DOL's novel interpretation of "sales" was not entitled to *Auer* deference.

The court noted that, rather than attempting to clarify the definition of "sales," DOL's regulations simply define a salesman as someone who "mak[es] sales within the meaning of section 3(k) of the Act," 29 C.F.R. § 541.500(a)(1). Because DOL's *amicus* brief purported to interpret a regulation that did "'little more than restate the terms of the statute itself,'" the court held that DOL's novel interpretation of "sales" was not entitled to controlling deference. Pet.App.23a (quoting *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006)). Deferring to DOL's brief in such circumstances, the court concluded, would "sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking." Pet.App.24a.

The court further held that DOL's "about-face regulation, expressed only in ad hoc *amicus* filings," Pet.App.35a, was not persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Based on the text of the FLSA and DOL's regulations, the court concluded that PSRs do in fact make sales "in some sense" and that the "sale" in the pharmaceutical industry is the "exchange of nonbinding commitments between the PSR and physician at the end of a successful call." Pet.App.26a. This "common sense understanding" of sales reflects the practical reality of the pharmaceutical industry, and is consistent with the text of section 3(k), which makes "open-ended use of the word 'sale', [and] *includes* 'other disposition[s].'" Pet.App.28a. It is also consistent with DOL's own usage and regulations, which as recently as 2004 reaffirmed the "open-ended concept that a salesman is someone who 'in some sense' sells." *Id.* The court thus concluded that PSRs were covered by the outside sales exemption. Pet.App.34a.

The court of appeals denied rehearing en banc, Pet.App.53a, and this Petition followed.

SUMMARY OF ARGUMENT

I. Under the plain text of the FLSA, DOL's regulations, and DOL's longstanding interpretation of those regulations, PSRs fall comfortably within the outside salesman exemption.

A. The FLSA adopts a broad, functional approach to exempt those employees who function in the "capacity" of outside salesmen. DOL has reinforced that breadth and flexibility by adopting the FLSA's own expansive definition of sales. That definition provides that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). By stating what a sale "includes," rather than what it "means," Congress made clear that the list of transactions deemed to constitute "sales" is illustrative, not exhaustive. The fact that this list is prefaced by the word "any," and includes "sale" among the multiple transactions covered, further confirm that the definition is not limited to a formalistic or technical conception of sales, but instead includes a broad swath of transactions, without regard to the specific manner in which sales occur in a particular industry.

DOL's regulations regarding the outside salesman exemption incorporate the broad, flexible statutory definition of sales, but do not further define the term, providing that an employee is exempt if his "primary duty" is "making sales within the meaning of section 3(k)." 29 C.F.R. § 541.500(a); *see id.* § 541.501(b). Since it first promulgated those regulations in 1940, DOL has repeatedly confirmed that the definition of "sales" must be applied in a pragmatic, functional manner, in which an employee engages in "sales" as long he makes a sale "in some sense" or "in a practical sense." As recently as 2005, DOL again reaffirmed its understanding that the term sale does *not* have a "fixed or invariable meaning," but must instead be applied contextually, based on the totality of the circumstances.

B. PSRs plainly engage in "sales" under this flexible, common-sense definition. Indeed, as both courts below concluded, PSRs are the pharmaceutical industry's outside sales force and conduct the relevant sales activity permitted in this highly regulated industry. The PSR positions for which Petitioners were hired were advertised as sales jobs and GSK made clear that it was looking for applicants with prior sales experience. After they were hired, Petitioners received extensive training about how to hone their sales techniques while complying with the unique regulatory environment. While on the job, Petitioners did what outside salesmen do—they spent their days outside the office meeting with physicians in designated territories, attempting to obtain commitments to write prescriptions for specific GSK products, where medically appropriate.

C. Treating PSRs as exempt is consistent with both the broader purposes of the FLSA and the specific purposes of the outside sales exemption. The exemptions are defined functionally and operate across all industries. The peculiarities of how sales take place in the pharmaceutical industry have everything to do with regulatory concerns unique to that industry and nothing to do with the policies of the FLSA or the wisdom of exempting individuals who function "in the capacity of outside salesman."

The FLSA was enacted to ensure a minimum standard of living for the nation's lowest-paid workers and those who worked under dangerous or difficult conditions. The PSR position, however, is one of the most desirable positions in the United States, with *median* pay exceeding $90,000 per year. PSRs also work by themselves, away from the home office, and it is both infeasible and undesirable for GSK to supervise their work closely. Flexibility and independence are critical and central to what makes this a desirable position. These longstanding aspects of the PSR position are simply incompatible with a rigid overtime regime.

D. Petitioners and DOL rely on a purported canon of construction under which the FLSA's exemptions must be interpreted narrowly. But even assuming such a canon exists, it would have no application here. DOL adopted the FLSA's own broad, flexible definition of "sales," and that term—which applies equally to the exemptions *and coverage provisions* which incorporate the term—is not subject to any narrow construction canon. Moreover, having adopted a definition of sales notable for its flexibility and breadth, DOL is now ill-positioned to insist on a narrow or formalistic definition of the term.

DOL's novel theory that "sales" must include a formal transfer of title has no basis in the language of the statute or regulations. At least one of the illustrative examples of a "sale" "include[d]" in section 3(k)—consignment—does *not* involve a transfer of title, and thus DOL's view cannot be reconciled with the statute itself. Reliance on dictionary definitions of "sale" is also misplaced. Congress defined sales in a manner that goes far beyond a narrow, technical interpretation of that term (and indeed, includes an unmodified "sale" among the transactions included in the broader statutory term), and it is this statutory definition—rather than a narrower dictionary definition—that must be given controlling effect.

The argument that PSRs are merely non-exempt "promoters" also finds no support in the regulations, the record, or the cases and opinion letters upon which Petitioners and DOL rely. Classification of an employee's work necessarily depends upon the circumstances under which the work is performed, and the exemption applies if promotional work is incidental to and in conjunction with an employee's own sales. The argument therefore begs the question whether PSRs engage in sales. While Petitioners rely on decades-old books and other extra-record material to argue that PSRs are promoters rather than salesmen, the record overwhelmingly demonstrates that PSRs do, in fact, make "sales."

Moreover, the regulation clearly envisions that non-exempt promoters would pave the way for someone else's sales. But here Petitioners seize on regulatory peculiarities of the pharmaceutical industry to portray the industry's entire sales force as promoters, and essentially deprive the industry of any *outside sales force*.

II. For more than 70 years, DOL consistently took a flexible, pragmatic approach to the meaning of sales. But it made an abrupt about-face in 2009, arguing for the first time in an uninvited *amicus* brief that "sales" require a formal transfer of title to the goods in question. That new position is entitled to no deference at all, much less the "controlling" *Auer* deference that DOL seeks.

A. DOL's new interpretation of sales cannot be squared with the plain text of the FLSA and DOL's prior regulations, neither of which can be read as requiring a mandatory transfer-of-title test. This Court has repeatedly held that agency interpretations that conflict with prior interpretations are not entitled to deference—particularly where, as here, the agency has not even acknowledged, let alone explained, its departure from precedent.

DOL's new interpretation of sales is also entitled to no deference for the separate and independent reason that the regulations purportedly being interpreted do little more than incorporate and paraphrase the statutory definition of "sales." DOL's new, formalistic interpretation of sales is inconsistent with the flexible, functional definition it has incorporated into its regulations. And it is well established that when a regulation merely parrots the underlying statute, the agency cannot claim binding deference to subsequent interpretations of those regulations. That is exactly the case here.

DOL's regulations clarify nothing about the scope of the term "sales," but instead merely quote and cross-reference the statutory definition.

B. If the Court were to conclude that deference is nonetheless warranted under existing precedent, it should reconsider those decisions and hold that no deference is owed to an agency interpretation of its own regulations set forth for the first time in an *amicus* brief in a private damages action. Deferring to the positions set forth in *amicus* briefs gives agencies a powerful incentive to avoid the rulemaking process altogether, thus depriving interested parties of notice and the opportunity for comment. It also gives agencies a strong incentive to promulgate vague, open-ended rules, then make the hard choices out of the public eye, in *ad hoc* and *post hoc* court filings. As a result, regulated parties will be left in the dark about what conduct is permitted or prohibited under those rules until it is too late.

Deference to an agency's interpretation of its own regulations set forth in an *amicus* brief also lacks the structural safeguards that are present in other administrative law doctrines. Congress has every incentive to be specific and precise when it is delegating authority to executive agencies, to avoid granting agencies excessive discretion and to ensure that the agencies will implement the new statute consistent with Congress' intent. But when an agency promulgates a vague rule, it leaves to *itself* the interpretation of that rule. If regulatory vagueness expands the agency's own interpretive discretion, then there is no check on the agency's incentive to strengthen its own hand through vague regulations. Advancing interpretations of regulations through *amicus* briefs also allows an agency to avoid the public and political scrutiny that would follow if it actually made the hard policy choices in its regulations. And permitting agency *amicus* filings in private damage actions to have dispositive effect *de facto* authorizes retroactive rulemaking and deprives the regulated community of fair notice.

III. A ruling in favor of Petitioners would have significant practical consequences for both employees and employers. A core attribute of the PSR position is its independence and flexibility, which allows those employees to schedule many work-related tasks around their personal obligations. Many of the most desirable aspects of the position would be lost if employers were forced to switch to a rigid, hours-based compensation regime and to closely monitor PSRs' activities. The Court should not allow DOL to upend the careers of the tens of thousands of PSRs who are not plaintiffs in this lawsuit, and who continue to thrive in their flexible and well-compensated careers.

ARGUMENT

I. PSRs FALL COMFORTABLY WITHIN THE OUTSIDE SALESMAN EXEMPTION

A. The FLSA and DOL's Regulations Require a Flexible, Pragmatic Approach to "Sales"

1. Under the FLSA, "[e]xcept as otherwise provided in this section," any employee working more than 40 hours in one week must receive compensation for those additional hours "at a rate

not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(1). Congress never intended the FLSA to reach well-compensated "white-collar" occupations, and so the Act exempts many different types of employees from that requirement, including "any employee employed in a bona fide executive, administrative, or professional capacity ... or in the capacity of outside salesman." *Id.* § 213(a)(1). Application of the exemption does not turn on labels or formalism. Instead, it turns on a functional inquiry into the "capacity" in which the employee works. *See Black's Law Dictionary* (9th ed. 2009) (defining "capacity" as "[t]he role in which one performs an act"); *Random House Dictionary of the English Language, Unabridged* 219 (1967) (defining capacity as "position, function, relation"). Equally important, these exemptions apply across industries and are not designed to turn on the technical details of how employees discharge the executive, administrative, or outside sales function in any particular industry.

The FLSA does not specifically define "outside salesman," but it does define "sale" in broad, flexible, and inclusive terms: "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *Id.* § 203(k). This one-sentence definition contains at least three powerful indications that Congress intended it to have both a broad and flexible meaning.

First, Congress' use of the word "includes"—as opposed to "means"—makes clear that the list of transactions deemed to constitute "sales" is illustrative, not exhaustive. The word "includes" is "usually a term of enlargement, and not of limitation," and "[a] term whose statutory definition declares what it 'includes' is more susceptible to extension of meaning ... than where ... the definition declares what a term 'means.'" *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008); *see West v. Gibson*, 527 U.S. 212, 217-18 (1999) (the word "including" in the list of Title VII remedies "makes clear that 'appropriate remedies' are not limited to the examples that follow that word").

For a number of the FLSA's definitions, Congress used the narrower word "means," which indicates that the definition is exhaustive. *See* 29 U.S.C. § 203(a) ("'Person' *means* an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons") (emphasis added); *id.* § 203(t) ("'Tipped employee' means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips"). But Congress chose to use the broader term "includes" in the definition of "sale," and the Court must give effect to that choice.

Second, the definition of "sale" includes the unmodified word "sale" as one illustrative example of the type of transaction that falls within the defined term. That fact alone suggests that Congress' intent was broader than any narrow conception of a sale. But Congress did not stop there. It also included in the definition of "sales" several types of transactions that are *not* considered to be sales in a formal or technical sense of the word, such as "exchange[s]," "contract[s] to sell," "consignment[s]," and the catch-all term "other disposition[s]." 29 U.S.C. § 203(k). When "a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000).

Third, Congress prefaced the list of illustrative examples of "sales" with the word "any." This Court has repeatedly held that, "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some *indiscriminately of whatever kind*.'" *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New Int'l Dictionary* 97 (1976)) (emphasis added); *see Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 130-31 (2002). The definition is thus not limited to particular types of sales, exchanges, consignments, or other dispositions, but includes *any* such transactions "of whatever kind."

2. DOL has authority to adopt regulations that "define[] and delimit[]" the scope of the outside salesman exemption, 29 U.S.C. § 213(a)(1), and it has promulgated regulations in exercise of that authority, *see* 29 C.F.R. § 541.500 *et seq*.

Those regulations, as well as DOL's other regulatory guidance, embrace a broad conception of "outside salesman," most obviously by incorporating the broad, inclusive definition of "sales" in section 3(k), without further elaborating on it. The first step is the important one. DOL perhaps could have defined "outside salesman" in some alternative manner, but DOL consciously incorporated the broad and flexible statutory definition of sales. Having incorporated that definition, the regulations do not elaborate on the definition in any meaningful way. For example, the regulations provide that "[t]he term 'employee employed in the capacity of outside salesman'" shall mean any employee whose "primary duty" is "making sales within the meaning of section 3(k) of the Act" and who "is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a). Another part of this regulation simply quotes the definition of "sale" verbatim and notes that this definition "include[s] the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b).

Another DOL regulation—entitled "Selling"—further emphasizes the breadth and flexibility of the statutory approach to sales by providing that "[a]s long as the employee in any way participates in the sale of the goods, he will be considered to be 'selling'" those articles. 29 C.F.R. § 779.241. That is, "if the employee performs any work that, *in a practical sense* is an essential part of consummating that 'sale' of the particular goods, he will be considered to be 'selling' the goods." *Id.* (emphasis added).

While the outside salesman regulations merely adopt and parrot the statutory definition, to the extent DOL has provided any gloss on its regulations, it has emphasized the flexible, common-sense approach to the word "sale." When DOL originally promulgated its rules in 1940, it explained that an employee engages in "sales" if he has, "*in some sense,* ma[d]e a sale." Stein Report 46 (emphasis added). A question had arisen whether employees were covered by the exemption if they were, for example, "selling [ ] time on the radio," "solicit[ing] advertising for newspapers and other periodicals," or "solicit[ing] freight for railroads." *Id.*

at 45. DOL noted that all of these activities were "popularly described as sales" or "commonly known as sales." *Id.* DOL further explained that, "in a practical sense, these people are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)." *Id.*

DOL has also provided guidance about how to determine in "border-line cases" if an employee is "'employed for the purpose of ... making sales.'" *Id.* at 51. That inquiry must focus on the "actual nature of the employee's work," rather than a formalistic conception of "sales." *Id.* The relevant "factors to be considered" include, *inter alia*: "the employer's specifications as to qualifications for hiring," "sales training," "proportion of earnings directly attributable to sales effort," "attendance at sales conferences," and "comparison of duties of employees in question and of other employees engaged as ... salesmen." *Id.* at 51-52.

When DOL revisited the definition of "outside salesman" in 1949, it again emphasized the functional nature of the inquiry. In addressing whether employees who perform "promotional activities" should be covered by the exemption, DOL reiterated that such employees "can be considered salesmen only if they are actually employed for the purpose of and are engaged in making sales or obtaining orders or contracts" and that "[w]ith such variations in the methods of selling and promoting sales each case *must be decided upon its facts*." Weiss Report 83 (emphasis added). DOL explained once again that "[i]n borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.*

DOL reaffirmed its longstanding interpretation of "sales" in 2004, noting that an employer qualifies for the exemption if "it demonstrates objectively that the employee, in some sense, has made sales." 69 Fed. Reg. at 22,162. DOL reiterated the importance of flexibility, concluding that "technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales." *Id.* The exemption applies as long as the employee "'obtain[s] a commitment to buy' from the customer and [is] credited with the sale." *Id.* In 2005, DOL again confirmed that "the term 'sale' does not always have a fixed or invariable meaning." Opinion Letter, 2005 WL 330605, at *2.

B. PSRs Engage in "Sales" under Section 3(k)

PSRs are plainly outside salesmen under the FLSA and DOL's implementing regulations. It is undisputed that the "outside" prong of the definition is satisfied because PSRs are "customarily and regularly engaged away from the employer's place or places of business in performing [their] primary duty." 29 C.F.R. § 541.500(a)(2). That is no small concession because it underscores that PSRs operate in an environment where the kind of close supervision that typifies non-exempt positions is impractical. This concession is also significant because it highlights that DOL's position turns entirely on a narrow, technical conception of sales that is inconsistent with the statutory provisions and the whole thrust of DOL's regulatory approach. There are certainly some aspects of the pharmaceutical industry and how it is regulated that make sales in this industry different. But it is equally certain that PSRs are the outside sales force for the pharmaceutical industry and that Petitioners were engaged in making sales "in a practical sense." Stein Report 45.

The PSR positions were advertised as sales jobs. In GSK's job description, number one on the list of "Key Responsibilities" was to "[s]ell products to specific customer market according to the business plan." JA 170. That list also includes delivering "sales presentations," developing "creative sales strategies," and creating "local business plan[s] to increase market share." *Id.* Petitioners understood that GSK was looking to hire candidates with sales experience. Indeed, Mr. Christopher was met with skepticism by GSK's recruiter because he lacked such experience. JA 7. And Mr. Buchanan thought that his substantial prior sales experience would help him "perform satisfactorily as a pharmaceutical sales representative." JA 53-54.

Once hired, Petitioners were given training, advice, and instructions about how to hone their sales techniques in the unique regulatory environment of the pharmaceutical industry. *See* JA 93-102. GSK's "Winning Practices" program taught PSRs to: know the intricacies of their territories; develop expertise about their products; gain "insight into [their] customers and how to influence them"; organize "the sales call to maximize ... selling time and results"; "confidently deliver the right selling message"; and "get the best possible commitment on every call." JA 217-18.

While on the job, Petitioners did what any other salesmen do. Their core responsibility was to meet with customer-physicians within their territories to obtain a commitment from those physicians to write more prescriptions for specific GSK products, where medically appropriate and consistent with the labeling. JA 50, 57, 85, 133, 170. In doing so, Petitioners targeted the physicians who presented the greatest opportunities for sales growth. JA 57-62, 72-73. Petitioners made sales pitches to those doctors about the benefits of their assigned products and the results of recent clinical trials, and educated them about product safety. JA 231-33. They provided free samples to help demonstrate the benefits of the products. JA 238. They answered questions and addressed any concerns about the products. JA 196. And they concluded each sales call by seeking a commitment from the physician to prescribe the GSK product in question when it was clinically appropriate to do so. JA 100, 134, 139, 235, 274. Although the regulatory environment in which they operated meant that their customers or sales targets were the prescribing physicians rather than the end-users, that regulatory detail did not alter their basic function as outside salespeople.

Nor did it affect their evaluations, which were based on Petitioners' sales efforts and performance. For example, one of Mr. Christopher's reviews praised him for focusing his "selling time" on the particular physicians with whom "there is the [greatest] potential for Boniva market share growth," and for "leverag[ing] his relationship with

Dr. Feldman to bring him from prescribing 'zero' Boniva to now prescribing 1 or 2 per month." JA 197. And, of course, it was the lack of supervision inherent in the "outside sales" function that ultimately led to Mr. Christopher's separation. SER 94-100, 200. Mr. Buchanan's review noted that he prepared for each "sales call" by developing a written plan that contained "historical prescribing data [with] competitive info, and an objective for each practitioner." JA 269. His "[s]ales materials were well organized and Frank was ready to sell." *Id.*

And Petitioners were paid as salesmen. Petitioners derived a substantial portion of their income from incentive-based compensation, which was calculated based on their sales efforts and performance. Petitioners earned between $67,243 and $84,932 each year they worked for GSK, with incentive pay comprising between 26% and 41% of their total compensation. Pet.App.7a n.8 (Christopher earned between $21,231 and $29,993 each year in incentive pay, and Buchanan earned between $19,232 and $32,519); JA 279. It was only because of the peculiarities of the regulatory controls on prescription pharmaceuticals that the incentive pay was not tied directly to the results of specific sales calls. But Petitioners were certainly "credited with" the sales in question. *See* Weiss Report 83; JA 277 (factors affecting incentive compensation).

In sum, Petitioners spent their workdays in the field, trying to obtain commitments from specific physicians in specific territories to write more prescriptions for specific GSK products. They were hired as salesmen, trained as salesmen, evaluated based on their sales techniques, paid based on their sales efforts and performance and—when they were not plaintiffs in litigation—even described themselves as salesmen. Unique aspects of the regulatory environment meant that they paid sales calls on prescribing doctors, not the end-user patients, but this did not alter the PSRs' basic sales function. They "make sales" in every relevant sense—both in common parlance and under the flexible, common-sense definition of "sale" set forth in the FLSA and DOL's regulations.

C. Treating PSRs as Exempt is Consistent with the Purpose of the FLSA and the Outside Sales Exemption

As noted above, *see supra* pp. 1-3, the purpose of the FLSA was to "promote economic justice and security for the lowest paid of our wage earners." S. Rep. 81-640, at 1-3. Exempt employees, in contrast, "typically earned salaries well above the minimum wage," and enjoyed "above average fringe benefits and better opportunities for advancement." 69 Fed. Reg. at 22,123-24.

PSRs are not even remotely within the scope of the harm Congress sought to remedy when it enacted the FLSA. In 2007, CNN/Money.com ranked the PSR position among the "best jobs in America" and reported that the *median* pay for such jobs is $93,700.[5] Even entry level PSRs typically make more than $60,000 per year; experienced PSRs often earn well into six figures.[6] Petitioners, both entry-level PSRs, earned between $67,243 and $84,932 each year they worked for GSK. Pet.App.7a n.8.

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[5] *Young and Restless—Top 20 Jobs, at* http://money.cnn.com/galleries/2007/moneymag/0703/gallery.bestjobs_young.moneymag/16.html.

More specifically, PSRs are exactly the types of employees to whom the outside salesman exemption was intended to apply. As the Tenth Circuit explained in a leading early case regarding the exemption, "[t]he reasons for excluding an outside salesman are fairly apparent." *Jewel Tea*, 118 F.2d at 207. Those salesmen, "to a great extent, work[] individually." *Id.* They work "away from [the] employer's place of business," are "not subject to the personal supervision of [the] employer," and the employer "has no way of knowing the number of hours he works per day." *Id.* at 208. An outside salesman also "ordinarily receives commissions as extra compensation" in lieu of overtime, and can "earn as much or as little, within the range of his ability, as his ambition dictates." *Id.* at 207-08. Thus, "[t]o apply hourly standards primarily devised for an employee on a fixed hourly wage is *incompatible* with the individual character of the work of an outside salesman." *Id.* at 208 (emphasis added).[7]

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[6] *Salesforce Survey 2008*, *at* http://www.pharmexec.com/pharmexec/article/articleDetail.jsp?id=483071.

[7] Contrary to Petitioners' and DOL's argument, Pet. Br. 45-46; U.S. Br. 21-22, *Jewel Tea* is not distinguishable in any material way. The plaintiffs in *Jewel Tea*—like Petitioners—were assigned specific territories, were provided sales training, were required to know extensive details about their products and customers, were subject to minimal oversight, and were paid based on their sales performance. 118 F.2d at 203-05. In

All of these statements could have been written about PSRs. PSRs do not punch a clock at the beginning and end of each day; they work independently, away from the main office, with little direct supervision other than a "ride along" with a supervisor once every month or two. JA 16, 76-78. Flexibility is critical—physicians have widely varying preferences about how much time they are willing to spend on a meeting and what topics they find most important, and PSRs must necessarily tailor their meetings and presentations to accommodate those preferences. *See* 69 Fed. Reg. at 22,123-24 (exempt work is often "difficult to standardize to any time frame"). The fact that PSRs interact with doctors—who are themselves highly educated professionals—underscores the specialized, white-collar nature of the PSR's function.

Moreover, as in *Jewel Tea*, the *quality* of a PSR's work is far more important than the sheer number of hours worked. The ultimate goal is to increase the number of prescriptions being written for the appropriate medical use of the PSR's assigned products—a PSR who can achieve that goal through short, persuasive meetings is far more valuable to GSK than a PSR who spends 12 hours per day meeting with doctors but has little success in increasing sales. Hourly compensation is incompatible with the very nature of the PSR position.

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any event, the Ninth Circuit relied on *Jewel Tea* not as directly controlling but because its description of the difficulties of treating outside salespeople as non-exempt is fully applicable to PSRs. Pet.App.28a-31a.

D. Petitioners' and DOL's Arguments to the Contrary Lack Merit

1. The Definition of "Sale" Should Not be Interpreted Narrowly

Petitioners contend that the FLSA's exemptions must be construed "narrowly." Pet. Br. 22-23. DOL less plausibly advances a "government-always-wins" canon of construction, under which the definition of "sale" is interpreted *broadly* when dealing with coverage and *narrowly* when dealing with exemptions. U.S. Br. 26-27.

But the term on which DOL's position turns is not just an exemption—it is the definition of "sale" in section 3(k), which applies throughout the FLSA, including to provisions specifying which employers are covered by the statute. DOL decided to incorporate that definition into the outside sales exemption. In doing so, DOL did not change the meaning of a term specifically defined (inclusively and flexibly) by Congress. The "'normal rule of statutory construction'" is that "'identical words used in different parts of the same act are intended to have the same meaning.'" *Gustafson v. Alloyd*, 513 U.S. 561, 570 (1995); *see Brown v. Gardner*, 513 U.S. 115, 118 (1994). *A fortiori*, a single definition must have the same meaning when the agency incorporates it into the definition of a related statutory term.

Those general principles are reinforced by the FLSA's direction that defined terms be given their uniform, specified meaning whenever they are "used in this chapter." 29 U.S.C. § 203. "Sale" is a defined term that is used at least 37 times in the FLSA, in a wide variety of contexts. Nothing in the statute remotely suggests that this definition will vary depending on whether it is used for coverage, an exemption, or another purpose altogether. There is thus no basis for an artificial presumption or thumb on the scale in either direction. And certainly where, as here, the agency expressly incorporates a statutory definition, the purpose for which it incorporates the term cannot trump Congress' definition. The Court should simply interpret and apply the definition of "sale" as written. *See Anderson v. Cagle's*, 488 F.3d 945, 957-58 (10th Cir. 2007) (definition of "hours worked" in 29 U.S.C. § 203(o) is "not an exemption under the FLSA," and thus not subject to any narrow-construction rule).

Finally, the canons Petitioners and DOL invoke cannot trump Congress' deliberate adoption of an inclusive and flexible definition of sales. The canon Petitioners invoke is hardly some deeply rooted and hoary canon of construction. Indeed, it is not clear that it has any more contemporaneous relevance than vague admonitions to interpret remedial statutes broadly. *See OWCP v. Newport News Shipbuilding*, 514 U.S. 122, 135-36 (1995) (describing broad-construction canon as "that last redoubt of losing causes"). But whatever its remaining relevance, it cannot trump Congress' deliberate decision to define sales broadly in Section 3(k). DOL simply cannot adopt that broad, flexible, and functional definition in its regulation and then urge this Court to interpret the term in a narrow, rigid, and formalistic way so that an exemption will be narrowly construed.

2. A "Sale" Does Not Require Transfer of Title

Petitioners and DOL further contend that making a sale requires "transfer of title" to the articles in question. Pet. Br. 25-27; U.S. Br. 4, 10-13, 24-25, 31. But the plain text of the FLSA requires no such thing. Indeed, at least one of the illustrative examples of a sale in section 3(k)—consignment—is notable precisely because it *does not* involve a transfer of title to the goods being consigned. *See Rahanian v. Ahdout*, 258 A.D.2d 156, 158-59 (N.Y. 1999) (distinguishing consignment from a "true sale" because "[t]itle and right to immediate possession remain with the [seller]"); *Ellet-Kendall Shoe Co. v. Martin*, 222 F. 851, 857 (8th Cir. 1915) ("a consignee of property for sale on commission acquires no title to the unsold property received under such contract"). Petitioners are thus flatly wrong to suggest that "each of the other items" in the statutory definition "involves an agreement to transfer the good's title." Pet. Br. 26.

Reliance on the *ejusdem generis* canon, *see* Pet. Br. 26; U.S. Br. 20-21, is misplaced for the same reason. Given that at least one of the illustrative examples of "sales" does not involve a transfer of title, there is no basis whatsoever for requiring *every* item in the list to include that limitation. This Court has refused to apply the *ejusdem generis* canon where "at least one of the specifically enumerated provisions" did not include the purported limitation. *Harrison v. PPG Indus.*, 446 U.S. 578, 588 (1980). Moreover, the definition of "sale" includes "*any*" sale, exchange, transfer, or other disposition. When Congress uses the word "any" before the phrase in question, there is no reason to adopt a "limiting construction" of the statute, and it is "inappropriate to apply the rule of *ejusdem generis*." *Id.* at 588-89.

DOL relies heavily on a regulation providing that the definition of "sale" in section 3(k) "include[s] the transfer of title to tangible property." U.S. Br. 31 (quoting 29 C.F.R. § 541.501(b)). But a regulation noting what is *included* in a statutory definition that is itself worded in terms of what sales *include* is not a promising basis for *excluding* anything. GSK has never disputed that transfers of title are *included* in the definition of sales. A transfer of title may be sufficient to give rise to a sale, but it is clearly not necessary; the text of section 3(k) confirms that. Indeed, so does DOL's regulation, which, one sentence later, simply repeats the statutory definition that "'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." *Id.*

Like the statute itself, DOL's regulation unquestionably encompasses transactions—such as consignments—that do *not* require a formal transfer of title. And, of course, a single, rigid transfer-of-title test would be inconsistent not only with the statutory and regulatory definitions but with DOL's reliance on numerous other considerations in conducting this analysis. *See* Stein Report 51-52. A rigid transfer-of-title requirement is also inconsistent with multiple court of appeals decisions holding that section 3(k) encompasses rentals or leases, even though these transactions are not "sales" in a formal sense of the word and do not involve transfers of title.[8]

DOL relies on various dictionary definitions of the word "sale" in support of its transfer-of-title theory. *See* U.S. Br. 18-19. But those definitions are irrelevant given that the FLSA contains its own definition of "sale." When "a statute includes an explicit definition, [courts] must follow that definition, even if it varies from that term's ordinary meaning." *Stenberg*, 530 U.S. at 942. Congress often defines terms in a manner that differs from those words' ordinary meaning. *Cf.* 16 U.S.C. § 1532(19) (defining "take" under the Endangered Species Act as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct"). Indeed, reliance on dictionary definitions of the word sale is particularly inappropriate here, given that an otherwise undefined and unmodified "sale" is only one illustrative example of a transaction that falls within the necessarily broader statutory definition.

Nor would such a rigid approach make sense in light of the FLSA's effort to adopt exemptions at a broad, functional level to apply across industries. In some industries, the relevant sale does not involve transfer of title based on customs or regulatory factors having nothing to do with the basic function of the outside salesman or with the policies of the FLSA. In some industries, the relevant sale is an agreement to lease, not an agreement to purchase. In another, the general contractor may be the relevant sales target, even though the technical purchaser may be the subcontractor or homeowner. And in the pharmaceutical industry, the doctor is the relevant "customer" or "sales target" because he writes the prescription, even though the end-user will ultimately take title at the pharmacy. Those details have everything to do with the customs or regulatory environments of the various industries and nothing whatsoever to do with the function of the outside salesperson or the policies of the FLSA.

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[8] *See Gieg v. DDR*, 407 F.3d 1038, 1048 & n.11 (9th Cir. 2005) (automobile leases are "sales" under section 3(k)); *Wirtz v. First Nat'l Bank*, 365 F.2d 641, 645 (10th Cir. 1966) (rejecting argument that "rentals are not sales"); *Wirtz v. Savannah Bank*, 362 F.2d 857, 863 (5th Cir. 1966) ("rental[s] from office space" constitute sales).

The anomaly of relying on a rigid transfer-of-title test is well-illustrated by considering two outside salespeople who might visit the same doctor on the same day. One sells non-prescription medical supplies—tongue depressors, bandages, blood pressure monitors, and the like—that a doctor either uses in the office or distributes directly to patients without a prescription. The other sells a product that, for regulatory reasons, can only be distributed to a patient with a prescription by a pharmacist. The two individuals' jobs are identical in all relevant respects: Both were hired because of their sales skills, both spend their days meeting with doctors in a designated territory to convince them to use specific medical products, and both are paid in large part based on their efforts and performance in selling those products. There is no reasonable basis for treating one as exempt and the other as non-exempt based on differences in regulatory treatment having nothing to do with the FLSA's policies and contrary to the statute's purposefully broad and flexible definition of sales.

3. PSRs Are Not Merely "Promoters"

Petitioners and DOL assert that there is a "bright line" in the regulations distinguishing "sales" from "promotional work that furthers sales by others" or "stimulat[es] the sales of [the] company generally," and that PSRs are properly classified as non-exempt "promoters." Pet. Br. 18-25; U.S. Br. 13-16, 21-25. That distinction is not nearly as "bright" as Petitioners suggest, but in all events has no application here because PSRs are selling specific products to specific doctors, not promoting sales by pharmacists to patients or stimulating GSK's sales "generally."

DOL's own "Promotion Work" regulation belies any notion of a clear divide between promotion and sales by providing that "[p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt *depending upon the circumstances* under which it is performed." 29 C.F.R. § 541.503(a) (emphasis added). The plain text of that rule makes clear that there is no bright line between salesmen and promoters. Promotional work that is "actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt." *Id.* In contrast, promotional work that "is incidental to sales made, or to be made, by someone else" is non-exempt. *Id.*; *see id.* § 541.503(b) ("Promotion activities designed to stimulate sales that will be made by someone else are not exempt outside sales work."); Stein Report 46 ("promotion men" are "engaged in paving the way for salesmen").

As already explained, PSRs "make sales" to doctors under section 3(k) and the regulations, but it is even clearer that they are not paving the way for someone else to make a sale to that doctor. And that is the situation the promotion language is designed to address—one person laying the groundwork with a sale target so that another person can close the sale with that same person. Here, Petitioners and DOL seize on the regulatory peculiarity that the doctor places the order, but that the transfer of title is between patient and pharmacist, to claim that PSRs are mere promoters of sales by others. That is doubly wrong. The PSRs are not paving the way for someone else to clinch the sale with the doctors, nor are they promoting sales between pharmacists and patients. Rather, PSRs make sales to doctors in a practical sense and the only sense that matters in this particular industry.

The record bears this out. To the extent PSRs engage in promotional work at all, that work is incidental to their *own* sales. There are no "other" salesmen whose way is paved by the PSRs' efforts, nor are the PSRs simply promoting the sales of GSK products more generally. Indeed, Petitioners' own job evaluations focused on their specific sales performance, including their ability to obtain commitments from specific doctors to prescribe more of the GSK products for which Petitioners were responsible. JA 197, 274.

The fact that other GSK employees might also sell products to pharmacies, health insurers, or other entities permitted by law to buy them does not alter the nature of PSRs' jobs. To the contrary, it only underscores that differences in regulatory schemes may affect when and where title transfers, but it does not affect the basic function of the outside salesperson. Under federal law, prescriptions are the *sine qua non* of sales of prescriptions drugs. *See* 21 U.S.C. § 353(b)(1) (certain drugs may be "dispensed only upon a written prescription"). Even the best sales force in the world could not convince pharmacies to stock GSK products unless physicians were writing prescriptions for those medications. Those prescriptions or authorizations to purchase are what make a sale. It is PSRs in the field who visit doctors' offices, build relationships, and have the primary duty to seek the commitments necessary to ensure that physicians are writing as many prescriptions as possible for those products for appropriate patients, as opposed to prescribing a competitor's products. To the extent other employees are involved in ensuring that pharmacies have the stock needed to fill those prescriptions, those efforts in no way undermine the reality that it is PSRs' work with doctors that produces the prescription, which is the relevant sale in this industry.[9]

Indeed, some state laws define "prescription" as "an oral, written, or electronic transmission *order* ... [i]ssued by a physician." Cal. Bus. & Prof. Code § 4040(a)(1)-(2) (emphasis added); *see also* 29 Pa.

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[9] As explained above, it would also be quite anomalous if an employee's exempt status turned on whether he was selling prescription drugs or non-prescription medical devices.

Code § 27.1 (defining "prescription" as "[a] written, electronic or oral *order* issued by a licensed medical practitioner" (emphasis added)). The fact that doctors must exercise independent judgment in deciding which, if any, GSK products to prescribe is irrelevant. If anything, this just underscores the professionalism and knowledge needed to be a PSR. Doctors are hardly the only sales targets who exercise independent professional judgment. A salesperson who persuades a doctor to prescribe a certain medicine when medically necessary—or a lawyer to use a forensic accounting service when legally appropriate for the client—is no less an outside salesperson for the sophistication of their sales target. Indeed, this only underscores the absurdity of treating PSRs as non-exempt. In the universe of outside salespeople, few sales forces are as well-educated and well-trained, or deal with as sophisticated a group of sales targets as PSRs. They are the last outside sales force that should fall outside the exemption, but they would be the first (though perhaps not last) under DOL's strained and formalistic approach that allows technical details of a non-FLSA regulatory regime to drive coverage, rather than the policies underlying the FLSA.

This case is fundamentally different from the cases and opinion letters upon which Petitioners and DOL rely in asserting that PSRs are promoters. Pet. Br. 45-48; U.S. Br. 33-34. In several of those cases and letters, the supposed outside salesman was actually more of a buyer than a seller. But DOL has long recognized that "it would clearly be a violation of the Administrator's power of definition and delimitation to include within an outside salesman exemption the exemption of the salesman's opposite and counterpart, the outside buyer." Stein Report 45-46. Thus, for example, in *Clements v. Serco*, 530 F.3d 1224 (10th Cir. 2008), the court noted that Army recruiters were more akin to buyers than salesman because they were attempting to entice recruits to *sell* their labor. *Id.* at 1229 n.4; *see id.* at 1231 (McConnell, J. concurring).[10] DOL has similarly concluded that "tissue recovery coordinators" who seek to encourage organ donations are not outside salesmen because their "selling of a concept" is "similar to that of outside buyers who in a very loose sense are sometimes described as selling their employer's 'service' to the person for whom they obtain their goods." Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994). That relationship "is the reverse of that of salesman-customer." *Id.*

In other cases and opinion letters finding the exemption inapplicable, the employees in question had only a limited sales role and paved the way for someone else to close the deal with the same sales target. *See Wirtz v. Keystone Readers Serv.*, 418 F.2d 249, 260-61 (5th Cir. 1969) (the role of student salesmen was "limited" because the orders they obtained were "turned over" to managers, who contacted the prospect, confirmed the order, and arranged a payment plan). Just the opposite is true here—PSRs are the *only* employees who engage in sales activities with respect to physicians.

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[10] Petitioners' reliance on *Ackerman v. Coca-Cola*, 179 F.3d 1260 (10th Cir. 1999), is equally misplaced. *Ackerman* concludes that, when employees actually consummate sales at the stores they visit, any related promotional work is exempt as "'incidental to and in conjunction with'" those sales. *Id.* at 1266. The court rejected the plaintiffs' attempt to draw a bright line between their sales activities and promotional activities. To be sure, the court noted that "a key inquiry" in deciding whether promotion work is "incidental to and conjunction with" sales is "whether the employee in question actually consummates the sale of his or her employer's products." *Id.* at 1265. But the court did not suggest that consummated sales are *always* required in order for promotion work to be exempt.

Petitioners' reliance on *Sorrell v. IMS Health*, 131 S. Ct. 2653 (2011)—a case that had nothing to do with the FLSA or the meaning of "sales"—is equally misplaced. In *Sorrell*, this Court recognized that the interaction between PSRs and physicians is not only unique and highly regulated but also commercially important and effective. That is precisely why Vermont sought to restrict PSRs' speech. *See id.* at 2659-63 (statutory goal was to restrict PSRs' ability "to ascertain which doctors are likely to be interested in a particular drug and how best to present a particular sales message" to those doctors).

Petitioners suggest that *Sorrell* turned on the fact that PSRs' interactions with physicians was not "commercial" speech. But this Court did not need to address that issue because the outcome of the case would have been "the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied." *Id.* at 2664, 2667; *see id.* at 2673 (Breyer, J. dissenting) (concluding that the Vermont statute limited access to data "that could help pharmaceutical companies create better sales messages" and that "this effect on expression is inextricably related to a lawful government effort to regulate a commercial enterprise").

Finally, Petitioners and the United States mischaracterize what DOL actually held in its 2004 rulemaking. Pet. Br. 18-19; U.S. Br. 31-34. In that rulemaking proceeding, DOL rejected a broad proposal that would have made *all* promotional work subject to the outside sales exemption. *See* 69 Fed Reg. at 22,162. But, in doing so, DOL did not impose a rigid, bright-line rule for distinguishing outside salesmen from outside promoters. Indeed, the overall purpose of the 2004 rulemaking was to make the outside sales exemption *more* flexible, not less.

Specifically, the 2004 amendments "address[ed] commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales." 69 Fed. Reg. at 22,162-63. As DOL explained, "[e]xempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system." *Id.*. In reaching that holding, DOL repeated its longstanding position that the exemption is available to all employees who "'*in some sense* make a sale.'" *Id.* at 22,162. Just as exempt status should not turn on the technological detail of "who types the order into a computer system," *id.* at 22,163, it should not turn on the technical, regulatory detail that transfer of title must await the presentation of the prescription to the pharmacist.

II. DOL'S LITIGATION POSITION IS NOT ENTITLED TO DEFERENCE

A. DOL's New Interpretation of "Sale" Is Entitled to No Deference

Petitioners and DOL spill much ink defending a proposition that GSK has never disputed—namely, that DOL's *regulations* were valid and are entitled to deference. *See* Pet. Br. 15-18, 36-42; U.S. Br. 17-19. The issue here is not the validity of those regulations in the abstract, but whether DOL's newly restrictive *interpretation* of its regulations—advanced for the first time in uninvited *amicus* briefs—is entitled to deference. On that issue, the parties disagree sharply.

1. DOL's newly formalistic interpretation of what it means to make a "sale" is entitled to no deference because it is "'plainly erroneous or inconsistent with the regulation.'" *Auer*, 519 U.S. at 461.

For the last 70 years, DOL has consistently interpreted its regulations, which expressly incorporate a statutory definition that is inclusive and functional, as reflecting a flexible, common-sense approach to "sales." DOL explained in 1940 that an employee falls within the definition as long as he has "in some sense, ma[d]e a sale." Stein Report 46. To determine whether certain categories of employees were covered, DOL would assess whether "in a practical sense, these people are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)." *Id.* at 45. DOL reaffirmed its longstanding interpretation of "sales" as recently as 2004, in light of new technologies, noting that an employer qualifies for the exemption if "it demonstrates objectively that the employee, in some sense, has made sales." 69 Fed. Reg. at 22,162.

Despite all this, in October 2009, DOL filed an uninvited *amicus* brief in the Second Circuit, in which it made a complete about-face and asserted that there can be no "sales" without a formal transfer of title to the goods in question. *See* Novartis Br. 5. The agency continues to press that argument before this Court, asserting that an employee sells goods only if he "transfers title" to those goods to the buyer. U.S. Br. 14, 24, 31. As explained at length above, a rigid transfer-of-title test cannot be squared with the plain text of the FLSA or DOL's regulations. *See supra* pp. 33-37.

Even if DOL's transfer-of-title theory were somehow consistent with the regulations—and it is not—this position would still constitute a *new* and quite different interpretation of "sales." An agency's interpretation of a statute or regulation that "conflicts with a prior interpretation" is "'entitled to considerably less deference' than a consistently held agency view." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994).[11] Similarly, while an agency is generally free to revisit its prior policies, it must at least "display awareness that it *is* changing position." *FCC v. Fox Television Stations*, 129 S. Ct.

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[11] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (refusing to defer to agency interpretation that was "contrary to [its] narrow view ... advocated in past cases"); *Paralyzed Veterans of America v. D.C. Arena*, 117 F.3d 579, 586 (D.C. Cir. 1997).

1800, 1811 (2009). Here, DOL refuses to acknowledge its change of position, let alone proffer a persuasive justification for the change.[12]

This is also a quintessential case in which the agency's reinterpretation of its regulation results in "unfair surprise" for the regulated parties. *Long Island Care at Home v. Coke*, 551 U.S. 158, 170-71 (2007); *see Arkema v. EPA*, 618 F.3d 1, 7 (D.C. Cir. 2010) (finding agency action to be impermissibly retroactive where it was "'substantively inconsistent' with [the] prior agency practice and attache[d] new legal consequences to events completed before its enactment"). DOL applied a flexible standard of "sales" for more than 70 years, and the pharmaceutical industry employs more than 90,000 PSRs annually in reliance on those employees' exempt status. Not until 2009 did the agency give the slightest indication that a transfer of title was an absolute prerequisite to a "sale," or that regulatory peculiarities having nothing to do with the FLSA would render the pharmaceutical industry without an outside sales force in DOL's view.

DOL's longstanding acquiescence in how PSRs are compensated casts doubt on the legal validity of its newfound formalism. It may be "possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing," but the "more plausible hypothesis" is that the industry "has been left alone because the character of its compensation system" is not unlawful. *Yi v. Sterling Collision*, 480 F.3d 505, 510 (7th Cir. 2007) (Posner, J.); *see PPL Montana v. Montana*, 132 S.Ct. 1215, 1235 (2012) (a State's "long failure to assert title is *some evidence* to support the conclusion" that it did not, in fact, possess title to the lands in question) (emphasis added); *New Process Steel v. NLRB*, 130 S. Ct. 2635, 2641-42 (2010) ("That our interpretation of the delegation provision is consistent with the Board's longstanding practice is persuasive evidence that it is the correct one, notwithstanding the Board's more recent view.").[13]

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[12] This is not to suggest that DOL could adopt a rigid transfer-of-title test even if it were to acknowledge the change and proffer an explanation. Given the regulation's incorporation of the flexible and inclusive statutory definition of "sale"—which includes transactions that do not involve a transfer of title, *see supra* pp. 33-37—it could not be subjected to such a narrow and formalistic gloss.

2. There are also more than a few reasons "to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. In both *Auer* and *Talk America*, a court invited the agency to file an *amicus* brief expressing its views about the question presented. *See Talk America v. Mich. Bell Tel.*, 131 S. Ct. 2254, 2259-60 (2011); *Auer*, 519 U.S. at 461. Here, in contrast, DOL has touted the fact that it is attempting to advance its policy agenda through uninvited *amicus* briefs. DOL has announced a formal "Overtime Security *Amicus* Program," in which the Office of the Solicitor will strategically file *amicus* briefs in "private cases" in order to "provide[] clearer, stronger overtime protection for America's workers."[14]

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[13] DOL cites a regulation providing that courts should not presume it has a "practice or policy to refrain from acting" unless there has been "some affirmative action" reflecting that policy. *See* U.S. Br. 28-29 (citing 29 C.F.R. § 790.18(h)). But the cited regulation implements 29 U.S.C. § 259(a), which provides a *complete defense* to liability if the defendant has acted "in conformity with" an administrative ruling from the agency. GSK has not invoked that categorical bar to liability. In all events, an agency cannot render decades of acquiescence legally irrelevant just by its say so.

Thus, DOL has announced an intention to change existing law to provide "stronger overtime protection," and to do so in a manner that gives no regard to settled expectations and circumvents the procedural safeguards that promote reasoned agency decision-making. DOL's novel interpretation of its regulations will have far-reaching consequences for both employers and employees in the pharmaceutical industry. *See infra* Part III. Rather than face the public and political scrutiny that would inevitably follow had the agency addressed this issue through a rulemaking proceeding (or even an interpretive rule), DOL announced its new policy for the first time in uninvited lower-court *amicus* briefs in private damage actions. This Court should not reward DOL's end-run around the rulemaking process by affording controlling deference to the agency's new position—endorsing DOL's conduct here would surely encourage other administrative agencies to begin "*amicus* programs" of their own.

3. Finally, *Auer* deference is inapplicable here for the separate and independent reason that DOL's regulations simply incorporate and then parrot the statutory definition of "sale." In *Gonzales v. Oregon*, the Attorney General issued an interpretive rule holding that using controlled substances to assist suicide was not a "legitimate medical purpose" under 21 C.F.R. § 1306.04. *See* 546 U.S. 243, 254 (2006). The government asserted that this interpretation was entitled to *Auer* deference because it was a reasonable interpretation of the Attorney General's regulations regarding controlled substances.

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[14] Overtime Security *Amicus* Program, http://www.dol.gov/sol/541amicus.htm.

This Court disagreed, holding that *Auer* deference applies only where "the underlying regulations gave specificity to a statutory scheme" and "reflected the [agency's] considerable experience and expertise ... with respect to the complexities of the [statute]." *Id.* at 256-57. But such deference is not warranted when a regulation "does little more than restate the terms of the statute itself." *Id.* at 257. When the agency has promulgated a "parroting regulation," the question "is not the meaning of the regulation but the meaning of the statute." *Id.* Put differently, an agency "does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.* It is "'certainly not open to an agency to promulgate mush and then give it concrete form only through subsequent less formal 'interpretations.'" *Paralyzed Veterans*, 117 F.3d at 584.

The rationale for the anti-parroting rule is straightforward. Agency interpretations of a *statute* do not receive *Chevron* deference unless they are advanced through relatively formal means, such as notice-and-comment rulemaking or adjudication.

See Christensen v. Harris County, 529 U.S. 576, 587 (2000). The anti-parroting rule prevents an agency from bootstrapping itself into a higher degree of deference by casting its action as an interpretation of a *regulation* rather than of the underlying statute. Without this rule, an agency could easily evade the limits on *Chevron* deference that this Court established in *Christensen* and *United States v. Mead Corp.*, 533 U.S. 218 (2001).

This case is squarely controlled by *Gonzales*. DOL's regulations provide that a salesman is someone whose primary duty is "making sales within the meaning of section 3(k) of the Act." 29 C.F.R. § 541.500(a)(1). Another part of the regulation quotes the definition of "sale" word-for-word and notes that this definition "include[s] the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b). The court of appeals correctly held that these regulations "clarif[y] nothing about the meaning of Section 3(k)," and "merely incorporate[] the very undefined, undelimited term the Secretary seeks to clarify." Pet.App.22a. DOL's subsequent interpretation of its "parroting regulation" is thus entitled to no deference under *Auer*. *See Gonzales*, 546 U.S. at 257.

Petitioners and DOL assert that the regulations provide additional clarification beyond the statutory language because they state that only an employee's "own" outside sales qualify for the exemption. *See* U.S. Br. 30-31 (quoting 29 C.F.R. §§ 541.500(b), 541.503(a)); Pet. Br. 42-43. But that language clarifies nothing at all. The dispositive question in this case is whether PSRs engage in "sales" under section 3(k). *See* U.S. Br. 11-12 (the "salient question" is whether the PSRs "sold goods" under section 3(k)). Inserting the word "own" in front of "sales" does nothing to alter this analysis or provide additional clarification beyond the plain language of section 3(k).[15] In any event, the parroting regulation need not be *identical* to the statute as long as it "paraphrase[s]" or is "near[ly] equivalen[t]" to the statutory text. *Gonzales*, 546 U.S. at 257. DOL's regulations—which expressly incorporate the statutory definition of sale in section 3(k)—plainly meet that standard.

B. This Case Underscores That Deference to Agency *Amicus* Briefs Is Misguided

If the Court concludes that *Auer* deference applies in this case under existing precedent, it should reconsider those decisions and hold that no deference is owed to an agency interpretation of its own regulations that is advanced for the first time in an *amicus* brief. That *ad hoc* approach to regulation significantly undermines the core principles embodied in the Administrative Procedure Act and this Court's administrative law jurisprudence—namely, notice and opportunity for comment, public and political accountability, and respect for the separation of powers.[16]

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[15] The regulation regarding "promotional work" is irrelevant for the same reason. That regulation merely distinguishes between promotional work directed towards the employee's "own" sales, which is exempt, and promotional work incidental to sales made by someone else, which is not exempt. *See* 29 C.F.R. § 541.503(a).

The Administrative Procedure Act provides that a "[g]eneral notice of proposed rule making shall be published in the Federal Register," and that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(b)-(c). These are not "arbitrary hoops through which federal agencies must jump without reason." *Sprint v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003). Rather, the APA's notice and comment requirements "improve[] the quality of agency rulemaking" by exposing regulations to "'diverse public comment.'" *Small Refiner Lead Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983). They also ensure "'fairness to affected parties'" and provide a well-developed record that "enhances the quality of judicial review." *Id.*

Granting *Auer* deference to *amicus* briefs gives agencies a powerful incentive to promulgate vague, open-ended rules, then seek controlling deference to legal briefs that are crafted out of public view, with no notice to regulated entities that a new policy is being considered, and no opportunity for comment before that policy becomes effective. An agency cannot purport to engage in reasoned decision-making when it makes the decision in question without having considered the views of interested parties on all sides of the issue. *See FLRA v. Dep't of Treasury*, 884 F.2d 1446, 1455 (D.C. Cir. 1989) (en banc) ("a position established only in litigation may have been developed hastily, or under special pressure, or without an adequate opportunity for presentation of conflicting views").[17]

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[16] Professor John Manning has provided the most comprehensive critique of *Auer* deference. *See Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612 (1996) ("Manning"). For a more recent critique that focuses specifically on the "powerful arguments" for withholding *Auer* deference from agency *amicus* briefs. *see* Matthew Stephenson & Miri Pogoriler, *Seminole Rock's Domain*, 79 Geo. Wash. L. Rev. 1449, 1492-94 (2011).

Deference to agency *amicus* briefs undermines another type of notice as well—namely, notice to regulated parties and the public about the conduct that is covered by the regulations. Agency rules "should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., concurring). But "deferring to an agency's interpretation of its own rule encourages the agency to enact *vague* rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 131 S. Ct. at 2266 (Scalia, J. concurring) (emphasis added).[18]

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[17] *See* Pierce, *Seven Ways To Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 86 (1995) ("Agencies are more likely to make wise and well-informed policy decisions if they solicit, receive, and consider data and views from all citizens who are likely to be affected by a policy decision.").

[18] *See Appalachian Power v. EPA*, 208 F.3d 1015, 1020 (D.C. Cir. 2000) (describing the "familiar" phenomenon in which agencies give substantive content to "broad," "open-ended" regulations "without notice and comment, without public participation, and without publication in the Federal Register"); Pierce, *supra*, at 85 (the vague regulations promulgated by agencies are often "utterly worthless for all

Similarly, when an agency adopts new policy positions for the first time in *amicus* briefs, regulated entities will often be left in the dark about what conduct is covered by the relevant regulations. *See* Manning at 670 (as a result of *Auer* deference, "regulated parties may find it more difficult to have a clear picture of relevant legal requirements until such parties have offended them"). It is hardly reasonable to expect regulated parties—particularly small or newly formed businesses—to monitor lower court dockets around the country in order to determine whether their conduct is lawful.

Deference to *amicus* briefs in private civil actions for money damages also raises serious retroactivity concerns. Retroactive rulemaking is generally disfavored. If an agency seeks to give a new regulation retroactive effect, it must do so clearly and must identify express statutory language authorizing that draconian remedy. *See Bowen*, 488 U.S. at 208-09. Any private action for money damages necessarily seeks to hold the defendant liable for *past* conduct. If an agency's uninvited *amicus* briefs in private litigation receive controlling deference, then the agency effectively gains the power to engage in retroactive rulemaking without satisfying the carefully crafted safeguards set forth in *Bowen*.[19] That is particularly true of an *amicus*

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purposes except one"—namely, allowing the agency to claim deference to subsequent interpretations of those rules).

[19] The test for whether an agency action has retroactive effect is not particularly demanding. *See Arkema*, 618 F.3d at 7 ("[e]ven where a rule merely narrows a 'range of possible interpretations' to a single 'precise interpretation,' it may

campaign designed to change the law to provide "stronger overtime protection." Indeed, DOL's *amicus* program is likely to have far-reaching retroactive effects given that wage-and-hour claims have been "skyrocketing" in recent years.[20]

Auer deference also lacks the structural safeguards that are present in other administrative law doctrines. For example, *Chevron* deference makes sense because there are built-in structural limits on Congress' willingness to delegate to administrative agencies. When Congress "enacts an imprecise statute that it commits to the implementation of an executive agency, [Congress] has no control over that implementation." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Thus, "[d]eferring to an agency's interpretation of a statute does not encourage Congress, out of a desire to expand its power, to enact vague statutes." *Id.* Especially in times of divided government, Congress has every incentive to use precise statutory language, to ensure that the executive branch will implement the statute as Congress intended.

In contrast, "when an agency promulgates an imprecise rule, it leaves *to itself* the implementation of that rule, and thus the initial determination of the rule's meaning." *Id.* Deference to an agency's interpretation of its own regulations "leaves in place

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change the legal landscape in a way that is impermissibly retroactive").

[20] *Wage and Hour Litigation Is Big—and Getting Bigger*, Corporate Counsel (Mar. 19, 2012), *at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202546026856&Wage_and_Hour_Litigation_is_Bigmdashand_Getting_Bigger.

no independent interpretive check on lawmaking by an independent agency." Manning at 639.

Applying *Auer* deference to agency *amicus* briefs would also lead to significant inconsistencies in this Court's administrative law jurisprudence. An agency's interpretation of a *statute* is not entitled to *Chevron* deference if it is set forth for the first time in a legal brief. *See Mead*, 533 U.S. at 238 n.19; *Bowen*, 488 U.S. at 212-13. There is no reason to treat an agency's interpretation of its own regulations any differently. "If one believes, plausibly, that Congress would not and should not allow an agency to authoritatively construe a statute in a *post hoc* litigation brief (written by agency lawyers in an adversarial context), then it is hard to articulate a good reason for assuming that Congress would nonetheless delegate to agencies the power to authoritatively construe regulations in this way." Stephenson & Pogoriler, *supra* n.16, at 1493.

Finally, regulation-by-*amicus*-brief allows the agency to avoid the public and political scrutiny that would follow if it actually made hard policy choices in its regulations. Here, for example, DOL's new interpretation of the outside salesman exemption will impose massive costs on the pharmaceutical industry (and likely other industries as well). Had the agency attempted to adopt this policy through an adjudication or notice-and-comment rulemaking, it would have been subject to public scrutiny, extensive comments from supporters and opponents of the new policy, and congressional oversight. There would have been substantial pressure, at a minimum, to make any change prospective only. By proceeding through *amicus* briefs, however, DOL was able to avoid much of this scrutiny and yet could still achieve the same policy outcome as if it had adopted its rules through a notice-and-comment proceeding. *See* Pierce, *supra* n.17, at 86 (noting that "agencies are more likely to make policy decisions that are consistent with the views of the people and their elected representatives if they provide public notice of their intention to make a particular policy decision").[21]

* * *

None of this is to suggest that the agency's views would be *irrelevant*. An agency would remain free to file *amicus* briefs explaining why its preferred interpretation is the right one. But such arguments should be considered based solely on the "the validity of [their] reasoning, [their] consistency with earlier and later pronouncements," and any other factors that have the "power to persuade." *Skidmore*, 323 U.S. at 140. Any additional thumb on the scale in favor of the agency comes at too great of a cost to the longstanding principles underlying the APA and this Court's administrative law jurisprudence. Here, in the guise of interpreting a regulation that incorporates an inclusive and flexible definition of sales, DOL has sought to impose a narrow and rigid gloss, with no prior notice to interested parties, no opportunity for comment, and little if any accountability to Congress and the public. If this is what *Auer* deference has come to, then the Court should abandon that doctrine, at least in the context of agency interpretations set forth for the first time in *amicus* briefs.

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[21] *Auer* deference also raises significant questions regarding the scope of delegated authority to an agency, especially where—as here—an agency's Solicitor's office has independent litigating authority. *See Nat'l Wildlife Federation v. Browner*, 127 F.3d 1126, 1129 (D.C. Cir. 1997) ("appellate counsel's interpretation may not reflect the views of the agency itself"); *Keys v. Barnhart*, 347 F.3d 990, 993-94 (7th Cir. 2003).

III. A RULING IN FAVOR OF PETITIONERS WOULD HAVE FAR-REACHING NEGATIVE CONSEQUENCES FOR EMPLOYEES AND EMPLOYERS

A ruling for Petitioners would severely and negatively affect the nearly 90,000 workers currently employed as PSRs. PSRs currently enjoy a great deal of independence and flexibility in managing their schedules. *See* JA 77 (Mr. Buchanan agreeing that he could "organize[] [his] own schedule" around his "personal life"); JA 75-77, 123, 155 (PSRs work at home reading e-mail, updating records, checking voicemail, and studying product literature). That flexibility and independence is particularly important for employees with young children or other personal obligations.[22]

Notwithstanding Petitioners' derisive suggestion that the PSR job attracts applicants who want to put their college cheerleading experience to good use, Pet. Br. 49, the position attracts many applicants who seek to work in an industry where outstanding performance is fairly rewarded. *See* JA 183-85, 246, 265, 274 (Petitioners touting their sales performance in seeking promotions and incentive compensation). The ability to earn substantial incentive compensation—combined with a flexible work environment and numerous other perks—makes PSR positions one of the most sought-after jobs in the country. But many of the most desirable aspects of the PSR position are not sustainable under a rigid overtime regime that would require the close supervision, highly structured work environment, and uniform hourly compensation that typically characterize non-exempt work. *Cf. Jewel Tea*, 118 F.2d at 207-08. And those negative effects will likely extend far beyond the pharmaceutical industry, as other positions that have long been considered exempt become the next targets of FLSA claims.

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[22] *Happiest Jobs for Working Moms*, http://www.careerbliss.com/press-releases/careerbliss-releases-happiest-jobs-for-working-moms/.

Petitioners downplay the financial impact of this flexibility by pointing out that GSK has recently "altered its compensation policy." Pet. Br. 30. That new policy, of course, is not at issue in this case. In any event, incentive compensation remains an important component of PSRs' overall compensation and is tied to their sales behaviors and competence. The key metric in determining that compensation is no longer the volume of prescriptions that PSRs obtain, but one of the factors that will be considered in determining their incentive compensation is their effectiveness in seeking commitments to prescribe for appropriate patients. And incentive compensation is also based on PSRs' "scientific and business knowledge," "feedback from customers in their region," and "overall performance of the business unit they support."[23] Those metrics still very much reward the PSRs who are most successful at developing the sales competencies that are essential to obtaining commitments from physicians for appropriate patients.

Fundamentally, the PSR position is no more of a 9-to-5 job than are outside sales positions in any other industry. It is that very nature of the job that makes it a rewarding and highly remunerative one for so many employees. Petitioners' and DOL's interpretation of the outside sales exemption would undermine the fundamental nature of the PSR position by retrofitting this long-exempt and highly competitive position with the rigid overtime requirements of the FLSA, thus providing an unwanted remedy for a non-existent problem. And it would do so based on regulatory peculiarities having nothing to do with the FLSA. This Court should not allow DOL to upend the careers of the tens of thousands of PSRs who continue to thrive in their flexible and well-compensated careers.[24]

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[23] GSK, *Delivering Value in a Values-Based Way* 5 (2010), *at* http://www.gsk.com/investors/presentations/ 2011/8th-CBI-Compliance-Jan11.pdf.

[24] DOL now suggests that PSRs might be covered by other exemptions, U.S. Br. 16 n.3, but it has previously argued, in both this case and *Novartis*, that the "administrative" exemption does *not* apply to PSRs. Pet.App.89a; Novartis Br. 17. While DOL has vacillated, GSK continues to believe, as it argued below, that the administrative exemption would apply, but the district court found it unnecessary to address this issue. Pet.App.46a-47a n.14.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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REPLY
BRIEF

APR 5 - 2012

No. 11-204

RECORD
AND
BRIEFS

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A GLAXOSMITHKLINE,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONERS

Respondent and other drug manufacturers "sell" their drugs to wholesalers and pharmacies, not to physicians. They have sales forces trained for that very purpose. Respondent's argument that pharmaceutical sales representatives (a.k.a. "detailers") are "outside salesmen" because they influence a *physician's* decision to prescribe a drug is thus flawed at its very root: the detailer does not sell, and the physician does not buy, any product. A conversation between a detailer and a physician might – *might* – set in motion a chain of events in which a prescription is written, which a patient then takes to a pharmacy, which as a consequence orders more of a drug from a wholesaler, which then consummates a "sale" with the drug company. But respondent does not even seriously argue that petitioners' detailing efforts somehow "make" that sale.

Even if physicians could somehow be regarded as respondent's customers, a "sale" is more than an interaction in which one person attempts to persuade the other of the merits of a product, which is all that happens when a detailer meets with a physician. The detailer is only permitted to deliver a highly regulated, scripted promotional message about particular drugs. At the end of the detailing conversation, the very most that respondent can hope is that the physician will offer a gratuitous, unenforceable, and qualified promise: that in a medically appropriate situation, the physician will prescribe a drug. That simply is not a sale. The detailer never delivers, nor promises to deliver, the drug; the physician never pays, nor promises to pay, any money; no particular patient is identified; and no enforceable commitment is made. Indeed, both the detailer and the physician know that any binding agreement would be unlawful and unethical.

Respondent points to the training detailers receive, to the sales skills necessary to excel at the job, to the fact that part of detailers' compensation is "incentive-based" (although not a commission), and to the fact that detailers attempt to convince particular doctors to prescribe specific products. That is just another way of saying that promotion and sales exhibit certain similarities. But promotion lacks the trait that Congress decided matters. A "sale" is not just a persuasive pitch, or even an endorsement of a particular product – otherwise, every well-crafted advertisement would be a sale. Rather, the hallmark of a sale is a *transaction* between a seller and a customer, and no transaction occurs when a detailer meets with a physician. To be sure, all of respondent's promotional efforts – including detailing, promotion to wholesalers and pharmacies, and advertising to the general public – play a role in expanding respondent's business. But that promotional work is not a "sale."

That is the better reading of the FLSA. But at the very least, it is obviously a *permissible* reading of the statute, which is the only issue before this Court. Congress expressly directed the Department of Labor (DOL) to define and delimit the term "outside salesman," a directive that necessarily contemplates that the agency will make judgments about the scope of this exemption from overtime. Applying its expertise, DOL determined to adopt a clear, bright-line rule on which employers and employees can rely in setting the terms of their relationship. That line divides exempt work "making sales" from "promotion work" that aids, but does not consummate, sales by others. Respondent cannot and does not provide any sound basis for this Court to override the agency's judgment and eviscerate that clear distinction, a ruling that would draw the courts into unending disputes about whether innumerable classes of employees are "close enough" to the FLSA's statutory exemptions – not merely the "outside salesman" provision – to exclude them from overtime eligibility.

I. Detailers Do Not Make Sales.

The categories of employees that the Fair Labor Standards Act (FLSA) exempts from overtime, which are to be read narrowly, *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960), include an "outside salesman," 29 U.S.C. § 213(a). Directed by Congress to "define[] and delimit[]" that phrase, *id.*, DOL has consistently specified that a salesman has the principal responsibility of "making sales," as distinct from "promotion work" that supports sales by others, 29 C.F.R. §§ 541.501, 541.503. Pharmaceutical "detailers" engage in promotion, not sales; drug companies have separate sales forces that sell their products to wholesalers, pharmacies, and hospitals. To the extent any ambiguity remains, DOL's interpretation of its regulations is binding, *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and the agency has concluded that pharmaceutical detailers are not outside salesmen, U.S. Br. 9; U.S. C.A. Br. 9. Respondent's contrary arguments are unpersuasive.

1. The statutory definition of a "sale" includes "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition"; it does not reach promotional activity that does not culminate in a transaction. 29 U.S.C. § 203(k). The same is true of the regulatory definition, which additionally provides that "[s]ales within the meaning of [the statute] include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. § 541.501(b).

Respondent takes issue (Resp. Br. 15, 33-37) with the Government's view that a sale requires a "transfer of title" (U.S. Br. 13), arguing that the statutory definition of "sale" includes "consignment for sale." But such consignments *do* provide for a transfer of title. Goods are consigned – *i.e.*, physically transferred pursuant to a binding agreement – to a consignee, who agrees to act as the consignor's agent by selling – *i.e.*, transferring title over – those goods to the end customer in exchange for payment. *See* BLACK'S LAW DICTIONARY 303 (7th ed. 1999) ("Consign" means "[t]o give (merchandise or the like) to another to sell, usu. with the understanding that the seller will pay the owner for the goods from the proceeds."). In any event, consignments – like every other "sale" respondent identifies (including auto leases and sales of physician-dispensed drugs) – involve a transaction, and detailing does not.

Respondent cites (Resp. Br. 22) an inapposite regulation, 29 C.F.R. § 779.241, which provides that an employee is considered to be "selling" if he "in any way participates in the sale" of goods, so long as his role is "essential" to the sale. But the "sale" here is between the drug company and an intermediary such as a wholesaler; detailers do not play an "essential" role in that transaction. In any event, that regulation does not apply here: it addresses when an enterprise qualifies as a retailer for purposes of FLSA *coverage*. The regulations defining the outside salesman *exemption* do not incorporate the definition in § 779.241 – rather, they draw a bright line that distinguishes between employees who consummate their own sales, and employees who do not. This is consistent with the principle that courts should construe the FLSA in light of its remedial purpose by reading its coverage provisions broadly, but its exemptions narrowly.[1] Respondent also cites (Resp. Br. 23) a multi-factor, indicia-of-sales test, but that likewise relates to a regulation not at issue here. *See* U.S. Dep't of Labor, *"Executive, Administrative, Professional * * * Outside Salesman" Redefined, Report & Recs. of Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition* 51-52 (Oct. 10, 1940) ("Stein Report") (discussing 29 C.F.R. § 541.504, which governs drivers who also make sales).

2. DOL's "outside salesman" rules also describe *non*-exempt "promotion work," which includes a

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[1] Respondent argues (Resp. Br. 31-32) that the canon of narrow construction does not apply to the regulatory definition of "sale" because it incorporates the broadly worded statutory definition. That is a non sequitur – the question is not whether the terms in the statutory definition are narrow or broad, but rather how the exemption should be construed in the face of ambiguity.

broad range of activities that encourage, but do not consummate, sales. 29 C.F.R. § 541.503. Such work is not exempt unless it is "actually performed incidental to and in conjunction with an employee's own outside sales." *Id.* § 541.503(a). DOL has recognized that everything a detailer does in an interaction with a physician, including obtaining a nonbinding commitment to prescribe the relevant drug, constitutes "promotion work" within the meaning of this regulation. U.S. Br. 9, 14-16. That conclusion provides an independent basis to reject respondent's argument, because if everything a detailer does falls under the rubric of promotion work, then it cannot be sales.

Respondent's arguments (Resp. Br. 37-43) that detailers are not promoters are unpersuasive. It asserts first that the distinction between promotion and sales is unclear because promotion work is also sometimes exempt. Respondent misreads the regulations, which state plainly that promotion work is *only* exempt when it is "incidental to and in conjunction with an employee's own outside sales." 29 C.F.R. § 541.503(a). If the regulation is ambiguous, the Secretary of Labor has the authority and expertise to resolve that ambiguity, and she has resolved it conclusively against respondent.

Respondent also argues (Resp. Br. 38-39) that detailers are not promoters because promotion work generally paves the way for another person's sales, but nobody else approaches physicians, and so detailers must be "salesmen." That is incorrect for two reasons. First, there is no basis for respondent's premise that all promotional work is directly followed by an approach by a "salesman." Relatedly, not every company that sells goods must have outside salesmen – it is entirely possible that none of respondent's employees fall within the exemption, and so the notion that detailers are the pharmaceutical industry's closest analogue to outside salesmen is irrelevant.

Second, respondent's premise is factually inaccurate because pharmaceutical companies do hire actual salesmen to sell to their actual customers. They have employees who deal with wholesale and retail distributors, hospitals, and other entities which (unlike physicians) legally can purchase drugs. Those employees negotiate prices, quantities, and other sale terms, they take orders, and they enter into contracts on the company's behalf. Importantly, those sales channels are entirely separate from the detailing visits at issue here. Respondent and its *amici* argue that this demonstrates that the distinction between sales and detailing is somehow artificial, but other than noting that the same products are involved, respondents provide no support for that contention. In reality, there are considerable differences between a detailer's job and a salesperson's job, including that detailers are required to deliver highly scripted and regulated marketing messages, and that it is impossible to precisely gauge a detailer's effectiveness in boosting sales.

Respondent counters (Resp. Br. 39) that a prescription is "the *sine qua non* of sales of prescription[] drugs." Not so. Prescriptions are several steps removed from respondent's sales. If and when the physician does prescribe the drug, there still may be no sale, because the patient may never fill the prescription, or the pharmacy may substitute a generic equivalent. And even *if* the pharmacist dispenses the drug, that also does not constitute a sale for respondent or the detailer – rather, the patient buys from the pharmacy (an independent company), which might in turn purchase from a wholesaler, which might in turn purchase from respondent through an entirely separate sales channel. Additionally, respondent's emphasis on prescriptions is arbitrary. A prescription is *one* important part of a drug sale, but manufacturing and distribution are equally essential, and nobody argues that those are "sales."

Moreover, even if this Court were to accept respondent's false premise that a prescription is the one, true *sine qua non* of a drug sale, it does not follow that a detailer's interaction with a physician also qualifies as a sale, because the detailer cannot ever induce a physician to enter into a binding commitment to issue the prescription. Instead, as petitioners, the *amici* medical professionals, and PhRMA (in a brief filed just last Term) have all explained, prescribing decisions are influenced by myriad factors, including first and foremost the physician's medical judgment, but also print advertisements, peer recommendations, academic literature, and patient preferences, all of which are beyond the detailer's influence. Petr. Br. 7; *Amicus* Br. of Medical Professionals 5-6; Brief for Respondent PhRMA at 6-8, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779) (listing the myriad sources of influence on prescribing decisions, and highlighting that only 11% of survey respondents described detailers as important). Indeed, physicians regularly "commit" to prescribe drugs as a pretext to get the detailer out the door, and the *amici* medical professionals explain that detailers' influence is marginal at best. *See* Petr. Br. 20 (citing *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 145 (2d Cir. 2010)); *Amicus* Br. of Medical Professionals 6-7.

Ultimately, respondent's plea to expand the outside salesman exemption replicates the argument that employers have made, without success, to Congress and DOL since 1940. Even if DOL could reasonably decide that outside promoters should be treated like outside salesmen, the contrary conclusion is also reasonable, and that is all the law requires.

3. Respondent emphasizes language in the regulatory history stating that in order for the outside salesman exemption to apply the exchange must only be a sale "in some sense." That is a significant misreading of the regulatory materials. In fact, DOL has merely recognized that – given the many ways in which sales may be effectuated (for example, by the customer over the Internet) – the employee must "*make*" the sale "in some sense." It has never deviated from its bedrock position that the "sale" in question must be a transaction with the customer. "In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a *commitment to buy from the person to whom he is selling*." Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, *Report and Recommendations on Proposed Revisions of*

Regulations Part 541, 83 (June 30, 1949) ("Weiss Report").

In fact, DOL has used the phrase "in some sense" only twice, and both times in order to explain why promoters like detailers do *not* qualify as outside salesmen. First was the 1940 Stein Report, in which DOL rejected employers' attempt to expand the exemption to cover "promotion men and missionary men" – employees who visit retailers, help those retailers sell the company's products, and encourage them to, for example, place the products prominently. The employers acknowledged that these employees were "admittedly not outside salesmen, in that they do not make actual sales," but argued that because of their role in sales, they should be exempt from overtime. Stein Report 46. DOL declined the employers' request, noting that promotion men are distinct from salesmen because "the promotion man is primarily interested in sales *by* the retailer, not *to* the retailer," and because the promotion man himself "makes no sales at all." *Id.* at 46-47. DOL thus concluded that "it would be an unwarrantable extension of the Administrator's authority to describe as a salesman anyone who does not in some sense make a sale." *Id.* at 46.

In response to a separate question, "What Are Sales?," the Stein Report noted that "[g]enerally speaking, the Division has interpreted section 3(k) of the act to include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." Stein Report 45. There was never any suggestion that promotion work, even if regarded as "sales" by the employer, would qualify.

Second was a 2004 notice-and-comment exchange relating to a request from employers and trade associations to expand the outside salesman exception to include promotional employees. The commenters made two arguments: first, "that promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process," and second, that "employees who have long functioned as outside sales employees may no longer be exempt under the proposed regulations because they no longer execute contracts or write orders *due to technological advances in the retail business*." Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (emphasis added). DOL rejected the first argument, but accepted the second. It modified its regulations, reasoning that "technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales." *Id.* But it stressed that:

> [T]he Department does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services . . . . Extending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test.

Id. Thus, under the 2004 regulations, as before, "[e]mployees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." *Id.* (quoting Weiss Report at 83). Although "[e]xempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button," mere promoters simply are not covered by the exemption. *Id.* at 22,163.

Respondent also cites (Resp. Br. 5, 24) a DOL opinion letter for the proposition that "the term 'sale' does not always have a fixed or invariable meaning." Respondent wrenches that language from its context. DOL actually said: "Though the term 'sale' does not always have a fixed or invariable meaning, it is generally held to be 'a contract between parties to give and to pass rights of property for money, which the buyer pays or promises to pay to the seller for the thing bought or sold.'" Opinion Letter from the Wage & Hour Division, U.S. Dep't of Labor, 2005 WL 330605 (Jan. 7, 2005) (quoting *Wirtz v. Charleston Coca-Cola Bottling Co., Inc.*, 237 F. Supp. 857, 866 (E.D.S.C. 1965)). The letter thus does not support respondent's argument that the term "sale" is malleable enough to include detailers' activities.

Respondent's interpretation is not only contrary to authority, but also unwise. To hold that an employee is a salesman so long as his duties can "in some sense" be described as sales – even if the employee engages in no transactions – would cast a cloud of uncertainty over the scope of the exemption. Every outside marketing employee and promoter would suddenly face the risk of losing overtime eligibility. The inevitable disputes would result in either workers accepting less pay (likely given the precariousness of the current job market) or costly litigation. On the other hand, requiring that "sales" include transactions preserves the existing bright-line rule so that employees understand their rights and employers their obligations. That rule allows the market to efficiently set base wages that can account for the overtime the employee is likely to receive, and to determine how many employees should fill a particular role.

4. In its brief, respondent does not dispute that it and others in the pharmaceutical industry have repeatedly insisted that detailers are not salesmen. *See* Petr. Br. 35 (citing products liability actions in which respondent argued that detailers did not sell its products). The following is a direct quote from a brief filed by respondent in a products liability action: "Pharmaceutical sales representatives, unlike other sales personnel, are unique in that they do not personally 'sell' the product; rather, they are merely a conduit for information between the manufacturer and the physician . . . ." J.A. 157a. PhRMA recently made the same point to this Court. Brief for Respondent PhRMA at 46, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011) (No. 10-779) ("The State . . . offers a misplaced analogy to a car salesman . . . . Pharmaceutical representatives do not haggle with doctors over price, and the doctor does not consume the drug but instead receives medical information relevant to courses of treatment for her patients."). Moreover, as petitioners have explained, while compensation for detailers has never been on a commission basis, companies including respondent are now further revising their compensation practices

to reflect the fact that detailers simply do not sell drugs. *See* Petr. Br. 30. In light of these undisputed and indisputable facts, it is simply disingenuous for respondent to now argue that detailers are salesmen.

II. This Court Should Defer To The Secretary's Determination That Detailers Are Not Outside Salesmen.

Respondent launches an assault on the well-established principle that courts should defer to an agency's interpretation of its own rules, whether expressed in an *amicus* brief or other authoritative guidance. Respondent argues first that DOL's position in this case somehow constitutes a deviation from its past interpretation of the overtime regulations. It then argues that deference is inappropriate because the regulations parrot the statute. In the alternative, respondent argues that this Court should overturn *Auer v. Robbins*, 519 U.S. 452 (1997). None of those arguments has merit.

1. Under this Court's jurisprudence, an agency's interpretation of its own ambiguous regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (internal quotation marks omitted). The rule has a long pedigree, *see, e.g.*, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and this Court has consistently deferred to agency interpretations of regulations set forth in *amicus* briefs. *See, e.g.*, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575, n.3 (2011); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 880 (2011); *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285,

296, n.7 (2009); *Auer*, 519 U.S. at 462. The Court has also deferred to agency interpretations in other informal documents. *See, e.g.*, *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2469-70 (2009); *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 171 (2007).

2. Respondent's argument (Resp. Br. 44-48) that deference is unwarranted in this case because DOL has changed its position is simply wrong. Respondent has not cited any authority – be it a regulation, interpretive rule, field manual, informal memorandum, or legal brief – in which DOL ever took the position that an employee who does not even attempt to consummate a sale can be treated as an "outside salesman" for overtime purposes. As demonstrated in Part I, *supra*, the agency's position on this issue has been consistent since 1940: salesmen are exempt, and promotion workers are not. The language that respondent criticizes (Resp. Br. 45) as "new," *i.e.*, that a sale requires a "transfer of title," comes from the 1940 Stein Report, which stated that "[g]enerally speaking, the Division has interpreted section 3(k) of the act to include the transfer of title to tangible property . . . ." Stein Report 45.

The fact that DOL has not previously pursued the pharmaceutical industry's overtime violations does not mean that it acquiesced in the industry's violations. *Contra* Resp. Br. 46-47. At most, it means that the pharmaceutical industry managed to underpay its workers for far longer than it should have. *See* U.S. Br. 28-29 (explaining that the paucity of enforcement does not signal acquiescence).

Further, decades ago, many pharmaceutical sales representatives actually made sales. *See* Petr. Br. 49.

3. Respondent's contention (Resp. Br. 48-51) that *Auer* deference is unwarranted because the regulations merely parrot the statutory definition of a "sale" is likewise incorrect. While the regulation does incorporate the statutory definition, it also adds the significant interstitial requirement that the employee in question must actually "make" the sales. 29 C.F.R. § 541.501(a)(1). The regulation further provides that sales "include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of individual property." *Id.* § 541.501(b). It also explains that the regulation applies to the sale of services as well as goods. *Id.* § 541.501(c). Those additional provisions reflect the Secretary's considerable experience and expertise in administering the FLSA, and speak to the key issue before the Court (whether a transfer of title is required). This case is therefore easily distinguishable from *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), in which the relevant regulation did "little more than restate the terms of the statute itself," and gave "little or no instruction on a central issue" in the case.

Even if the "making sales" regulation, 29 C.F.R. § 541.501, tracks the statutory language too closely to merit *Auer* deference, the "promotion work" regulation, 29 C.F.R. § 541.503, does not, as it does not incorporate *any* statutory provision. Instead, the regulation explains that promotion work is distinct from sales, and provides that when promotion work is not "actually performed incidental to and in conjunction with an employee's own outside sales or solicitations," that work is not exempt. 29 C.F.R. § 541.503(a). The regulation also provides that an employee who "does not consummate the sale nor direct efforts toward the consummation of a sale" does not fall within the outside salesman exception. *Id.* § 541.503(c) In this case, the Secretary has determined that detailers' activities fall within the category of promotion work, and are therefore not exempt. *See* U.S. Br. 9, 14-16. Thus, even if this Court does not credit the Secretary's determination that a sale must involve the transfer of title, it should still defer to the Secretary's explanation that obtaining a non-binding commitment to prescribe a drug constitutes promotion, and not sales.

4. Respondent argues that if *Auer* deference applies, then the Court should overturn *Auer*, along with the long and uninterrupted line of cases that precedes it. That argument is flawed at the outset because *stare decisis* protects deeply embedded legal principles like *Auer* deference. *Stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827 (1991). Any party seeking to overrule precedent must bear "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez v. Hillery*, 474 U.S. 254, 266 (1986). The key factors are "workability, . . . the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned." *Montejo v. Louisiana*, 129 S. Ct. 2079, 2088-89

(2009). There is no doubt that the rule of *Seminole Rock* and *Auer* is workable, is not antiquated, and is relied upon by courts, agencies, and regulated parties alike. As explained in greater detail *infra*, the rule is also well reasoned. Moreover, if agency deference were overturned, it would expose the marketplace to uncertainty and critically undermine a principal goal of federal regulation: uniformity across jurisdictions.

In arguing to the contrary, respondent hypothesizes two objections: first, that deference promotes unreasoned, spur-of-the-moment agency decision making without appropriate procedural safeguards; and second, that agencies abuse deference by promulgating vague regulations. Critically, respondent argues both of these points at a high level of abstraction, essentially speculating about agency temptations. But despite the decades-long pedigree of the rule affording controlling deference to an agency's interpretation of its own regulations, respondent and its *amici* cannot supply any evidence that agencies actually engage in this sort of chicanery, and the record of this case demonstrates that DOL does not. Respondent's argument would thus fail even on a blank slate. In light of *stare decisis*, it is a non-starter.

First, this case is a bad vehicle to test the validity of *Auer* because the issue is not squarely presented. Petitioners submit that the Court can best decide this case by holding that DOL bears principal responsibility for interpreting FLSA's various overtime exemptions, and deferring to its interpretation. But, for the reasons stated in Part I, *supra*, the Secretary's reading of the regulations is the one the Court should adopt in any event, so that the Court need not actually even rely on *Auer* to resolve this case. Additionally, all of the rules that respondent complains about – *i.e.*, the "transfer of title" / "consummation of sales" requirement, and the determination that detailers are engaged in promotion work – are either expressly stated in the regulations themselves or represent straightforward applications of the rules. And the question presented in this case – whether an employee who does not consummate actual sales, but whose job shares some traits with a sales job, should be regarded as exempt outside salesman – has been an issue since 1940, and DOL has been completely consistent in refusing to recognize promoters as outside salesmen. So the regulated community and the public have had ample notice of DOL's position, as well as opportunity to comment on it.

Respondent suggests that DOL has deliberately attempted to circumvent administrative procedures. There is no evidence to support that claim. Nor is there any reason to believe that agency interpretive guidance will on the whole be less – rather than more – favorable to regulated parties.

Respondent stresses (Resp. Br. 44-45) that the *amicus* briefs filed in the courts of appeals were uninvited. But respondent provides no sensible reason (much less authority) that the lack of an invitation matters. No decision of this Court has ever drawn such a distinction, and the Court presumably does not "invite" merits *amicus* participation by the United States only because it is familiar with the Solicitor General's practice of participating in such cases as a matter of course. Respondent also notes (Resp. Br. 48) that the DOL Solicitor created an "*amicus* program" in 2004. While respondent contends (Resp. Br. 48, 54) that DOL seeks to "change the law" through litigation, the very announcement that respondent quotes establishes that the *amicus* program was adopted at the same time as the 2004 regulations, and that DOL's only goal is to enforce those regulations, which were promulgated after full notice and comment, according to their terms. The *amicus* program assists in the implementation of the new rules by "allow[ing] the Solicitor's Office in appropriate cases to share with courts the Department's view of the proper application of the new Part 541 rule." Solicitor of Labor, Overtime Security *Amicus* Program, http://www.dol.gov/sol/541amicus.htm (last visited Apr. 6, 2012). Enforcing the law is not improper.

Respondent's argument also fails on its own terms. Contrary to respondent's insinuations, *Auer* deference is not *carte blanche* for agencies. First, if an agency position is plainly erroneous or inconsistent with the relevant regulations, then deference is not warranted. *Auer*, 519 U.S. at 461. Second, *Auer* does not authorize deference when a regulation merely parrots the statute. Third, courts need not defer when "faced with a post-hoc rationalization . . . of agency action that is under judicial review," or if there is "other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am., Inc.*, 131 S. Ct. at 2263 (internal quotation marks omitted). Fourth, before the agency can interpret its regulations, it must enact them. Any efforts to enact broad or vague regulations will meet with stiff resistance during the rulemaking process. The Court's existing precedents thus protect against agency abuse; and the fact that courts rarely reject deference demonstrates that agencies are not engaging in the sort of overreaching that respondent identifies.

With those safeguards in mind, deference to agency interpretations of regulations does far more good than harm. Administrative agencies supervise vast and complex systems, from the U.S. labor market to the environment to the military, to name just a few. Agencies inevitably must react to unforeseen circumstances. And agencies know this, and so they sometimes enact flexible standards rather than rigid rules. When applying those standards, deferring to the agency makes sense, as the agencies possess expertise that generalist courts do not, and it will not always (or even typically) be practical or desirable to test agency action in court before allowing it to proceed.[2]

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[2] In fact, although *Auer's* principal critics rest their case on separation of powers arguments, *see* John Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612 (1996), it is worth asking whether a dramatically more activist judiciary is truly the best answer to an unproven claim of agency overreaching. By empowering courts to second-guess agencies' interpretations of their own rules, this Court could risk undercutting the agencies' delegated authority to interpret and enforce the law. Overturning *Auer* would also invite parties disappointed with the results they obtain in administrative processes to redirect their lobbying efforts from agencies to the courts, forcing judges to take on increased policymaking responsibilities.

Auer deference also promotes uniformity in the application of federal laws. If courts routinely second-guessed agency judgments, the resulting patchwork of interpretations would inject uncertainty into the marketplace, encourage forum shopping, and increase litigation costs. Affording deference to agency interpretations permits regulated parties to act based on a confident understanding of their legal obligations, without fearing the significant costs and uncertain outcome of potentially conflicting court rulings. Uniformity is especially important in economically sensitive areas such as the labor market, where prolonged uncertainty can have grave consequences for citizens' material well-being.

Respondent's proposed rule also admits no limiting principle. While respondent argues that *amicus* briefs should not receive deference, there is no basis to limit judicial skepticism. Any guidance issued without full notice and comment – for example, DOL opinion letters on which the regulated community heavily relies – would raise the concerns that respondent identifies. But to deny deference to all such guidance would unravel decades of settled administrative practice.

Respondent's rule is also impractical. It presumably would require agencies to engage in notice-and-comment rulemaking for every decision, or forgo judicial deference. Such an approach would squander agency resources, diminish agency flexibility, and generally render governance more difficult. Also, to the extent that existing regulations have been promulgated in reliance on *Auer*, the continued enforcement of those rules might become needlessly complicated as courts begin to second-guess agency pronouncements.

Respondent finally argues that a ruling for petitioners would have negative practical consequences. It begins by implying that the FLSA simply should not apply to employees like detailers, who are well paid. But the FLSA protects employees "from the evil of overwork as well as underpay." *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942). Importantly, its overtime provisions not only compensate employees for overwork, but also "spread employment" by making chronic overtime more expensive than hiring an additional employee. *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948). Consequently, "employees are not to be deprived of the benefits of the Act simply because they are well paid." *Jewell Ridge Coal Corp. v. Local No. 6167, United Mineworkers*, 325 U.S. 161, 167 (1945); Stein Report 8.

Respondent also warns (Resp. Br. 58-59) that employees will suffer because the degree of independence and flexibility they supposedly enjoy is inconsistent with a "rigid overtime regime." It is unclear whether this is a threat or merely paternalism, but the Court should reject it either way. Employers must track the hours of the many classes of non-exempt "outside" employees, 29 C.F.R. § 516.2(a)(7), and to the extent that employees must assist in that, the associated administrative burden pales in comparison with working a 60-hour week for 40 hours' pay. Two *amicus* briefs filed by detailers from other pharmaceutical companies confirms that detailers do not share respondent's view that the denial of overtime pay is part of a benevolent plan to protect their flexible lifestyle.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

7

No. 11-204

In the Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER, ET AL., PETITIONERS

v.

SMITHKLINE BEECHAM CORPORATION,
DBA GLAXOSMITHKLINE

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. 201 *et seq.*, imposes minimum-wage and overtime-pay requirements on covered employers. The FLSA exempts from those requirements "any employee employed * * * in the capacity of outside salesman." 29 U.S.C. 213(a)(1). The question presented is as follows:

Whether the FLSA's "outside salesman" exemption applies to pharmaceutical sales representatives who promote but do not sell their company's drugs to physicians.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case presents the question whether the "outside salesman" exemption of the Fair Labor Standards Act of 1938 (FLSA or Act), 29 U.S.C. 213(a)(1), applies to pharmaceutical sales representatives who promote but do not sell drugs to physicians. The Secretary of Labor is responsible for administering and enforcing the FLSA, and is authorized to promulgate regulations "defin[ing] and delimit[ing]" the terms used in the exemption. 29 U.S.C. 213(a)(1). Pursuant to that authority, the Secretary has determined through notice-and-comment rulemaking that the "outside salesman" exemption does not encompass workers who promote their employers' products in order to facilitate sales by other company employees. The United States therefore has a significant interest in the resolution of the question presented here.

STATEMENT

1. In 1938, Congress enacted the FLSA to eliminate "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. 202(a). To address substandard working conditions, Congress required employers covered by the Act to pay their employees a minimum wage for all hours worked. 29 U.S.C. 206 (2006 & Supp. IV 2010). The FLSA also requires covered employers to pay their employees at a rate of one and one-half times their regular rate of pay for time worked in excess of 40 hours in a workweek. 29 U.S.C. 207 (2006 & Supp. IV 2010).

Those minimum-wage and overtime-pay requirements, however, do not apply to

> *any employee employed* in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or *in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary*, subject to the provisions of subchapter II of chapter 5 of title 5 * * *).

29 U.S.C. 213(a)(1) (emphasis added). This case presents the question whether a pharmaceutical sales representative who promotes but does not sell drugs to physicians is employed "in the capacity of outside salesman."

2. In 1938, 1940, and 1949, the Secretary promulgated regulations interpreting the "outside salesman" exemption. At least by 1949, those regulations distinguished between exempt outside salesmen (who consummated their own sales) and nonexempt promoters (who stimulated the overall sales of their companies but did not consummate their own sales). See 14 Fed. Reg. 7730 (Dec. 28, 1949) (codified at 29 C.F.R. 541.500-504 (Cum. Supp. 1962)). In both 1940 and 1949, after holding hearings, the Department of Labor (Department) issued reports on proposed changes to the regulations. See U.S. Dep't of Labor, Wage & Hour Div., *"Executive, Administrative, Professional . . . Outside Salesman" Redefined: Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition* (Oct. 10, 1940) (*Stein Report*); U.S. Dep't of Labor, Wage & Hour & Public Contracts Div., *"Executive" "Administrative" "Professional" "Local Retailing Capacity" "Outside Salesman": Report and Recommendations on Proposed Revisions of Regulations, Part 541* (June 30, 1949) (*Weiss Report*).

On both occasions, regulated parties asked that "promotion men and others engaged in 'indirect sales' be included within the definition of 'outside salesman.'" *Weiss Report* 82; see *Stein Report* 46. Both times, the Department declined to define the exemption in a manner that would encompass promotional activities. See *id.* at 46-47; *Weiss Report* 82-84. The Department concluded in 1940 that "it would be an unwarrantable extension of the Administrator's authority to describe as a salesman anyone who does not in some sense make a sale." *Stein Report* 46. The agency reaffirmed in 1949 that "the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Weiss Report* 83.

The Department's FLSA regulations remained virtually unchanged for 55 years. In 2004, following notice-and-comment procedures, the Department revised its "outside salesman" regulations. See 69 Fed. Reg. 22,122 (Apr. 23, 2004) (revising 29 C.F.R. 541.500-504). Those revisions, however, did not make any relevant substantive changes. The regulations continue to provide that an outside salesman must be primarily engaged in making sales or obtaining service orders, 29 C.F.R. 541.500(a)(1)(i)-(ii); that making sales of goods requires the transfer of title to those goods, 29 C.F.R. 541.501(b); and that promotional work is not exempt unless it is directed toward consummation of the employee's own sales, 29 C.F.R. 541.503.

The current regulations thus maintain the distinction between sales work and promotional work that the Department first articulated in the 1940s, even though several commenters requested during the 2004 rulemaking that the distinction be eliminated. See 69 Fed. Reg. at 22,162. The United States Chamber of Commerce, for instance, argued that "promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process." *Ibid.* The Department responded in the regulatory preamble that it did not "intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders for contracts for services." *Ibid.* The Department explained that "[a]n employer cannot meet this requirement unless it demonstrates objectively that the employee, in some sense, has made sales." *Ibid.* The Department concluded that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Ibid.*

3. Petitioners Michael Shane Christopher and Frank Buchanan were formerly employed as pharmaceutical sales representatives (PSRs) by respondent SmithKline Beecham Corporation dba GlaxoSmithKline (GSK). Petitioners visited physicians within their assigned territories, presented them with information concerning GSK medications, and attempted to persuade the physicians to prescribe those GSK medications to their patients. Pet. App. 4a. In preparation for those visits, GSK trained petitioners on how to promote its products to doctors. *Id.* at 5a-6a. GSK then provided petitioners with information on the doctors' prescribing habits, "[c]ore [m]essages" that should be included in petitioners' presentations, a budget for social events with the physicians, and sample products for distribution to the physicians. *Id.* at 4a-5a.[1]

Although GSK recruits applicants with prior sales experience for its PSR positions, PSRs are prohibited by federal law from selling samples, taking orders for any medication, or negotiating drug prices or contracts with either physicians or patients. Pet. App. 5a. A pharmaceutical company like GSK must sell its medications to distributors or retail pharmacies, which then dispense those medications to patients as authorized by licensed doctors' prescriptions. *Id.* at 4a. Although PSRs may seek nonbinding oral commitments from physicians to prescribe GSK medications, it is impossible to determine with certainty whether a PSR's promotional work induced any particular prescription. GSK therefore pays incentives based on the overall performance of a given product in a PSR's assigned territory. *Id.* at 6a-7a, 46a. GSK aims for a PSR's total compensation to be approximately 75% salary and 25% incentive-based. *Id.* at 7a.

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[1] This brief uses the term "PSR" to refer to those representatives who, like petitioners, are responsible for promoting but not selling pharmaceutical products to physicians. To the extent that companies employ outside representatives who actually sell pharmaceutical products to retailers and wholesalers, those employees may fall within the "outside salesman" exemption.

4. Petitioners brought suit, alleging that respondent had violated the FLSA by failing to pay compensation for overtime work. Pet. App. 9a. The district court granted respondent's motion for summary judgment. *Id.* at 37a-47a. The court appeared to recognize that the Department interprets the "outside salesman" exemption to apply only when an employee "is actually engaged in activities directed toward the consummation of his own sales." *Id.* at 40a (quoting 69 Fed. Reg. at 22,163). The court determined, however, that "a PSR engages in what is the functional equivalent of an outside salesperson," and it declined "to adopt a hypertechnical construction of the regulations that runs counter to the purpose of the Act." *Id.* at 46a. Petitioners subsequently moved to alter or amend the judgment, relying on an amicus brief filed by the Department in *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), cert. denied, 131 S. Ct. 1568 (2011). The district court denied that motion, concluding that the

Department's interpretation was not entitled to any deference. Pet. App. 48a-52a.

5. The court of appeals affirmed. Pet. App. 1a-36a. As in *Novartis*, the Department filed an amicus brief arguing that PSRs are not covered by the FLSA's "outside salesman" exemption. *Id.* at 16a-17a; see *id.* at 64a-90a. The court of appeals recognized that "a proper interpretation of the FLSA is necessarily guided by the regulations issued by the Secretary of Labor." *Id.* at 12a. The court further recognized that, "[i]n the regulations, the Secretary draws a distinction between sales work and promoting." *Id.* at 14a. The court of appeals nevertheless ruled in respondent's favor, holding that the Secretary's position was not entitled to deference because (in the court's view) the pertinent regulations simply paraphrase the language of the FLSA. *Id.* at 21a-22a. In the alternative, the court held that deference was unwarranted because "the Secretary's position is both plainly erroneous and inconsistent with her own regulations and practices." *Id.* at 24a; see *id.* at 25a-36a.

SUMMARY OF ARGUMENT

A. The FLSA authorizes the Department to "define[] and delimit[]" the terms used in 29 U.S.C. 213(a)(1). The Department has long taken the position that the term "outside salesman" is limited to employees who make their own sales, and does not encompass workers who perform promotional functions that facilitate sales by others. Under that approach, petitioners were not covered by the exemption because they promoted GSK's products to physicians but were legally barred from selling those products to either doctors or patients. Indeed, the link between petitioners and any ultimate sales was particularly attenuated because the physicians with whom petitioners interacted were not the intended purchasers of the products in question.

B. The Department's regulations "defin[ing] and delimit[ing]" the scope of the "outside salesman" exemption are entitled to judicial deference. Those regulations accord with the usual understanding of the term "salesman" as referring to persons who sell. The longstanding regulatory distinction between exempt outside sales work and nonexempt promotional work also provides a readily administrable standard. Regulated employers have repeatedly asked the Department to extend the "outside salesman" exemption to workers who promote products and thereby facilitate sales by others, and the Department has repeatedly declined to take that step.

C. To the extent that the Department's regulations are ambiguous, the agency has repeatedly interpreted those rules not to exempt promotional work of the type that petitioners perform. In a variety of documents, the Department has reaffirmed the basic distinction between employees who make their own sales and employees whose promotional activities facilitate sales by others. In amicus briefs filed in this and other recent cases, the agency has addressed the application of that principle to PSRs and has argued that PSRs are not exempt "outside salesm[e]n" because they do not make sales. The agency's interpretation of its own regulations is entitled to judicial deference.

ARGUMENT

THE FLSA'S "OUTSIDE SALESMAN" EXEMPTION APPLIES TO EMPLOYEES WHO SELL GOODS OR SERVICES, NOT TO EMPLOYEES WHO PROMOTE GOODS OR SERVICES IN ORDER TO FACILITATE SALES BY OTHERS

In exercising her statutory authority to "define[] and delimit[]" the term "outside salesman," 29 U.S.C. 213(a)(1), the Secretary has long distinguished between direct sales work (which is exempt) and promotional work that may eventually result in sales by others (which is not exempt). Federal law prohibits PSRs from directly selling pharmaceutical products to physicians or patients. Under the Labor Department's longstanding regulatory approach, employees like petitioners, who promote but do not directly sell their companies' products, are not employed "in the capacity of outside salesm[e]n." *Ibid.*

A. The Department's Regulations Distinguish Between Direct Sales Work And Promotional Work That May Result In Sales By Others

1. Congress expressly authorized the Department to define and delimit the scope of the "outside salesman" exemption

The "outside salesman" exemption appears within a broader exemption that also covers executive, administrative, and professional employees, and within a statute that contains other exemptions as well. The FLSA does not define the term "outside salesman," but provides instead for that term to be "defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. 213(a)(1). The FLSA thus explicitly "leaves gaps" in the statutory scheme and "provides the Department with the power to fill these gaps through rules and regulations." *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 165 (2007). Here, as in *Long Island Care at Home*, "[t]he subject matter of the regulation in question concerns a matter in respect to which the agency is expert, and it concerns an interstitial matter, *i.e.*, a portion of a broader definition, the details of which * * * Congress entrusted the agency to work out." *Ibid.*

2. *The Department's regulations interpret the "outside salesman" exemption to apply only to employees who consummate sales of goods or services*

In the 1930s and 1940s, after consulting with representatives of industry and labor, the Department issued regulations that interpreted the "outside salesman" exemption. In 2004, following notice-and-comment procedures, the Department revised and reissued those regulations. See 69 Fed. Reg. at 22,122. Three of those regulations—the general "outside salesman" regulation, 29 C.F.R. 541.500; the making-sales regulation, 29 C.F.R. 541.501; and the promotion-work regulation, 29 C.F.R. 541.503—are directly relevant here. The general regulation specifies that the main duty of an outside salesman must be to sell goods or services away from the employer's place of business; the making-sales regulation specifies that selling goods or services means transferring title to property (in the case of goods) or taking orders (in the case of services); and the promotion-work regulation specifies that promotional work is exempt only if it is incidental to an employee's own outside sales. Taken as a whole, the Department's regulations draw a clear distinction between exempt sales work and nonexempt promotional work.

a. The Department has promulgated a "[g]eneral rule for outside sales employees," 29 C.F.R. 541.500, which recognizes that the words "outside" and "salesman" in 29 U.S.C. 213(a)(1) impose two distinct requirements for exempt status. An employee works "outside" if he "is customarily and regularly engaged away from the employer's place or places of business in performing [his] primary duty." 29 C.F.R. 541.500(a)(2); see 29 C.F.R. 541.502 (defining what it means to work away from an employer's place of business). PSRs typically satisfy that requirement because they "usually work outside of a [GSK] office and spend much of their time traveling to the offices of, and working with, physicians within their assigned geographic territories." Pet. App. 4a.

An employee is a "salesman" if his "primary duty" is "making sales within the meaning of [29 U.S.C. 203(k)]" or "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. 541.500(a)(1)(i)-(ii); see 29 C.F.R. 541.700(a) (defining an employee's "primary duty" as "the principal, main, major or most important duty that the employee performs"); 29 C.F.R. 541.2 (providing that an employee's status as exempt or nonexempt is determined by his "salary and duties," not his "job title alone"). As explained below, the making-sales prong of that test refers to the sale of goods, and the obtaining-orders prong refers to the sale of services. The general regulation thus interprets the term "salesman" to encompass any employee whose primary job is selling goods or services. Because it is undisputed that petitioners did not obtain orders for services, see Pet. App. 21a, the salient question is whether they sold goods, *i.e.*, whether they were "making sales within the meaning of [29 U.S.C. 203(k)]."

The FLSA provides that the term "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. 203(k). The general "outside salesman" regulation incorporates that definition by providing that an employee qualifies as a "salesman" under Section 213(a)(1) if he makes "[s]ale[s]" under Section 203(k). To be sure, the general regulation does not define what it means to "mak[e]" sales; that is the subject of a companion regulation discussed below. But the general regulation does specify that "[i]n determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's *own outside sales or solicitations* * * * shall be regarded as exempt outside sales work." 29 C.F.R. 541.500(b) (emphasis added). The general regulation thus presumes that the "primary duty of an outside sales employee" is making "the employee's own outside sales or solicitations."

b. The Department also has promulgated a regulation that defines "[m]aking sales" or "[o]btaining orders." 29 C.F.R. 541.501. It specifies that "[s]ales within the meaning of [Section 203(k)] include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property." 29 C.F.R. 541.501(b). Under the regulation, an employee who transfers title to tangible goods (like automobiles or shoes) is a salesman, as is an employee who transfers title to tangible evidences of intangible property (like stocks, bonds, or insurance policies). An employee does not make a "sale" for purposes of the "outside salesman" exemption unless he actually transfers title to the property at issue.[2]

c. The Department has promulgated an additional regulation that specifically addresses "[p]romotion work." 29 C.F.R. 541.503. That rule explains that "[p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed." 29 C.F.R. 541.503(a). Under the regulation, "[p]romotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work." *Ibid.* By contrast, "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work." *Ibid.*

The regulation further clarifies the scope of the "outside salesman" exemption by giving examples of exempt and nonexempt promotional work. For instance, the regulation discusses "a company representative" who visits a store and performs various tasks that include "consult[ing] with the store manager when inventory runs low" but do not include "obtain[ing] a commitment for additional purchases." 29 C.F.R. 541.503(c). Under the regulation, such a representative "does not consummate the sale nor direct efforts toward the consummation of a sale," and his in-store promotional activities are "not exempt outside sales work." *Ibid.* The regulation further explains that a "manufacturer's representative" is exempt as an outside salesman only if his "primary duty is making sales or contracts." 29 C.F.R. 541.503(b). "Promotion activities directed toward consummation of the employee's own sales are exempt," the regulation reiterates, whereas "[p]romotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." *Ibid.*

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[2] The regulation recognizes that outside sales work includes not only "the sales of commodities" but also "obtaining orders or contracts for services or for the use of facilities." 29 C.F.R. 541.501(c) (internal quotation marks omitted). Use of "[t]he word 'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. 541.501(d). With services as with goods, however, an employee qualifies as a "salesman" under 29 U.S.C. 213(a)(1) only if he actually sells or takes an order.

3. *Under the Department's regulations, petitioners were not outside salesmen because they did not, and legally could not, sell respondent's products to physicians or patients*

The pertinent Labor Department regulations unambiguously provide that an employee is an "outside salesman" only if his primary duty is selling goods or services away from his employer's place of business; see 29 C.F.R. 541.500(a)(1)(i); that an employee sells goods only if he transfers title to those goods to the buyer, 29 C.F.R. 541.501(b); and that an employee's promotional activities are exempt only if they are incidental to and in conjunction with that employee's own outside sales, 29 C.F.R. 541.503(a). The regulations thus make clear that an employee who extols a product's virtues in order to facilitate sales by others does not qualify for the "outside salesman" exemption. See *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 153 (2d Cir. 2010) (*Novartis*) ("[T]he regulations * * * make it clear that a person who merely promotes a product that will be sold by another person does not, in any sense intended by the regulations, make the sale."), cert. denied., 131 S. Ct. 1568 (2011).

Petitioners' primary duty was to persuade physicians of the merits of GSK products, thereby increasing the likelihood that the doctors would prescribe GSK products to their patients. Successful performance of petitioners' job would ultimately increase demand for (and thus sales of) GSK pharmaceuticals. Petitioners were prohibited by federal law, however, from selling samples of GSK products, taking orders for any GSK medication, or negotiating drug prices or contracts with either physicians or patients. Pet. App. 5a. At most, petitioners could persuade a physician to prescribe a particular GSK product to her patient, who could elect to fill that prescription at a pharmacy, which would have purchased the product from a wholesaler, which would have purchased the product from GSK. See *Novartis*, 611 F.3d at 153-154.

The courts below were therefore wrong in concluding that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet. App. 51a; see *id.* at 25a-27a. GSK has a sales force that takes and processes orders from retailers and wholesalers. To be sure, members of that sales force will not fall within the "outside salesman" exemption if they perform their duties at GSK facilities rather than "outside" GSK's places of business. Cf. 69 Fed. Reg. at 22,162 (treatment of inside sales employees as exempt would be "beyond the statutory authority of the Administrator"). Nothing in the FLSA suggests, however, that every covered employer (or every covered employer that manufactures products for retail sale) must be deemed to employ outside salespeople. When economic or legal imperatives lead an employer to hire inside salespeople and outside promoters, neither class of employees is covered by the "outside salesman" exemption.[3]

The link between PSRs' promotional activities and any resulting sales is particularly attenuated because the physicians with whom PSRs interact are not the ultimate purchasers of GSK products. See *Novartis*, 611 F.3d at 154 ("The type of 'commitment' [PSRs] seek and sometimes receive from physicians is not a commitment 'to buy.'"). The court of appeals concluded that, because "the patient is not at liberty to choose personally which prescription pharmaceutical he desires[,] * * * he cannot be fairly characterized as the 'buyer.'" Pet. App. 26a. That is a non sequitur. Although the need for a doctor's approval is surely a distinctive feature of prescription-drug sales, it does not call into question the patient's status as the purchaser. Indeed, as the volume of print and television advertisements for prescription drugs attests, the pharmaceutical industry understands that patients, not physicians, are the true purchasers of its products. Because the prescribing physician neither pays for the relevant pharmaceutical product nor takes title to it, the court of appeals' description of the doctor as "the 'real' buyer" (*ibid.*) is at best a metaphor. The fact that petitioners had no contact with potential buyers of GSK products reinforces the conclusion that they did not make sales themselves but rather facilitated sales by others.

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[3] The fact that an employee does not qualify for the "outside salesman" exemption does not prevent the employee from qualifying as exempt under other provisions of the FLSA, provided that he meets the requirements of another exemption. See 69 Fed. Reg. at 22,163; see also 29 C.F.R. 541.503(a).

B. The Department's Regulations Are Entitled To Judicial Deference

"If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984). Such "legislative regulations" must be upheld "unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844. If the legislative delegation to the agency on a particular question is "implicit" rather than "explicit," the agency's interpretation must be upheld if it is "reasonable." *Ibid.* In either circumstance, a reviewing court cannot reject the agency's interpretation "simply because the agency's chosen resolution seems unwise." *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

The FLSA exempts particular categories of employees, including persons employed "in the capacity of outside salesman," "as such terms are defined and delimited from time to time by regulations of the Secretary." 29 U.S.C. 213(a)(1). In light of Congress's express directive that the term "outside salesman" will be given the meaning the Secretary assigns to it, the Department's interpretation is entitled to particular respect. Cf. *Webster* v. *Doe*, 486 U.S. 592, 600 (1988) (explaining that the statute at issue, which authorized dismissal of CIA employees "whenever the Director 'shall *deem* such termination necessary or advisable in the interests of the United States[,]' * * * fairly exudes deference to the Director") (quoting 50 U.S.C. 403(c) (1988)). The Department's regulations, promulgated after notice-and-comment rulemaking, reflect a reasonable interpretation of the FLSA's language and provide a readily administrable test for classification. And, contrary to respondent's contention, the Department's view that PSRs fall outside the "outside salesman" exemption is consistent with its longstanding regulatory practice.

1. The Department's interpretation follows naturally from the FLSA's language and provides an easily administrable test

a. When the FLSA was enacted, the term "salesman" meant "[o]ne whose occupation is to sell goods or merchandise," and the term "sale" meant the "[a]ct of selling; a contract whereby the absolute, or general, ownership of property is transferred from one person to another for a price, or sum of money, or, loosely, for any consideration." *Webster's New International Dictionary* 1871 (1917); see 9 *Oxford English Dictionary* 50 (1933) (defining "[s]alesman" as "[a] man whose business it is to sell goods or conduct sales"); *id.* at 49 (defining "[s]ale" as "[t]he action or an act of selling or making over to another for a price; the exchange of a commodity for money or other valuable consideration"). Consistent with that understanding, the Department has long interpreted the FLSA's "outside salesman" exemption to apply only to employees who consummate their own sales, *i.e.*, employees who transfer title to goods or take orders for services. See, *e.g.*, *Stein Report* 46 (stating in 1940 that "it would be an unwarrantable extension of the Administrator's authority to describe as a salesman anyone who does not in some sense make a sale").

To be sure, the marketing of pharmaceutical products to physicians—a practice commonly known as "detailing," *Sorrell* v. *IMS Health Inc.*, 131 S. Ct. 2653, 2659 (2011)—was a less significant business practice at the time of the FLSA's enactment. See Pet. App. 7a-8a nn.9-10; see also Julie Donohue, *A History of Drug Ad-*

vertising: The Evolving Roles of Consumer and Consumer Protection, 84 Milbank Q. 659, 668 (2006). But the terms "salesman" and "detail man" are distinct in current usage. A "salesman" is "employed to sell goods or services either within a given territory or in a store—see SALESCLERK, TRAVELING SALESMAN; compare DETAIL MAN." *Webster's Third New International Dictionary of the English Language* 2003 (1993) (*Webster's Third*). By comparison, a "detail man" is "a representative of a drug manufacturer who introduces new drugs to professional users (as physicians or pharmacists)." *Id.* at 616; see *The American Heritage Dictionary of the English Language* 494 (4th ed. 2006) (defining a "detail man" as "[a] representative of a manufacturer of drugs or medical supplies who calls on doctors, pharmacists, and other professional distributors to promote new drugs and supplies").

In addition to its primary meaning, the term "salesman" has developed a more colloquial usage as "one who seeks to persuade others to accept or approve an idea, system of thought, or course of action." *Webster's Third* 2003 (giving as an example of that usage the statement that "[a]mbassadors in overalls can be the best salesmen of democracy") (emphasis omitted). PSRs might be regarded as salesmen in that colloquial sense because they seek to persuade physicians "to approve" a "course of action"—namely, the patient's purchase and use of particular prescription drugs. In promulgating rules used to determine whether particular workers are "employed * * * in the capacity of outside salesman" (29 U.S.C. 213(a)(1)), however, the Department acted reasonably in selecting the standard employment-based usage of the term "salesman."

If the agency had defined "salesman" in its broader sense, the exemption would have encompassed various classes of employees, including promoters, advertisers, and other types of marketers, who are not commonly characterized as salespeople. See, *e.g.*, *Clements* v. *Serco, Inc.*, 530 F.3d 1224, 1228 (10th Cir. 2008) (civilian military recruiters who had no authority to enlist recruits were not outside salesmen); *Gorey* v. *Manheim Servs. Corp.*, 788 F. Supp. 2d 200, 207 (S.D.N.Y. 2011) (auctionhouse's "outside sales representatives" were not outside salesmen because they obtained only nonbinding commitments from car dealers to participate in auctions). Acceptance of respondent's position would eviscerate the Department's longstanding regulatory distinction between sales work and promotional work that is intended to facilitate sales by others.

The court of appeals observed that the FLSA defines the term "sale" in an "open-ended" way, Pet. App. 28a, by providing that "'[s]ale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*." 29 U.S.C. 203(k) (emphasis added). In that context, the term "disposition" itself indicates a transfer of some interest in goods or services. See 3 *Oxford English Dictionary* 493 (1933) (defining "[d]isposition" in part as "[t]he action of disposing of, putting away, getting rid of, making over * * * ; bestowal"). In any event, consistent with the interpretive canon of *ejusdem generis*, the Department reasonably interprets the italicized catch-all language to share the common characteristic of the preceding enumerated terms, so that the "other disposition" must be in some sense a sale, see *Novartis*, 611 F.3d at 153, *i.e.*, a contract for the exchange of goods or services in return for value. Although the Department has interpreted that basic requirement flexibly to encompass the various ways in which salespeople can obtain a commitment to buy, see pp. 32-33, *infra*, it has adhered to the view that an outside salesman's efforts must be directed toward the consummation of his own sales.

b. The Department's distinction between exempt outside sales work and nonexempt promotional work also provides an easily administrable standard. In "borderline cases" it may be difficult to discern whether an employee's efforts "are directed toward stimulating the sales of his company generally" or are instead directed toward "the consummation of his own specific sales." 69 Fed. Reg. at 22,162-22,163. That test is far easier to administer, however, than the one applied by the courts below, which looks to whether employees who do not contract for the exchange of goods or services can nevertheless be considered the functional equivalent of salespeople within a particular industry. See Pet. App. 25a-27a, 46a. The court of appeals did not suggest that *every* employee whose promotional activities facilitate sales by others is a "salesman" within the meaning of 29 U.S.C. 213(a)(1). Rather, the court appeared to conclude that PSRs are "outside salesm[e]n" because, given the legal constraints on sales activity in the pharmaceutical industry, PSRs are the closest analogue to traditional salespersons that the industry has to offer. See Pet. App. 26a-27a. That approach would substantially complicate the FLSA inquiry by introducing industry-by-industry variations into the criteria used to determine "outside salesman" status.

As support for its functional-equivalency approach, the court of appeals relied in part (see Pet. App. 28a-31a) on *Jewel Tea Co.* v. *Williams*, 118 F.2d 202 (10th Cir. 1941). The Tenth Circuit in *Jewel Tea* discussed the policy reasons for excluding outside salespeople from the scope of the FLSA, among them that (i) outside salespeople ordinarily receive commissions "[i]n lieu of overtime * * * as extra compensation" and (ii) enforcement of the FLSA's overtime-pay requirements would be difficult for outside salespeople, who are not subject to close daily supervision by their employers. See *id.* at 207-208. The court of appeals in this case concluded that, because the duties and work conditions of PSRs overlap substantially with those of the salesmen in *Jewel Tea*, PSRs should likewise be covered by the "outside salesman" exemption. See Pet. App. 30a-31a.

The employees involved in *Jewel Tea*, however, were salesmen in the classic sense, because they visited customers' homes and solicited and took orders for tangible goods. See 118 F.2d at 203-204, 208. The court in *Jewel Tea* may have accurately identified certain characteristics of outside salespersons (compensation through commissions and insulation from close supervision) that led Congress to exempt such workers from the FLSA. Congress did not make the exemption applicable to all workers who share those attributes, however, but instead referred specifically to persons "employed * * * in the capacity of outside salesman." 29 U.S.C. 213(a)(1). Consistent with that congressional choice, the Department has long required, as a prerequisite to coverage by the exemption, that a particular employee must in some sense make sales.

2. *The "outside salesman" regulations represent the consistent and considered judgment of the Department for more than 70 years*

Respondent contended at the certiorari stage that the amicus briefs filed by the Department in the courts below reflected an "abrupt departure from [the agency's] long-standing position." Br. 3. That is incorrect. The Department first recognized the distinction between exempt sales work and nonexempt promotional work in the 1940s, and it has adhered to that distinction ever since, including when it revised the current regulations in 2004. See *Novartis*, 611 F.3d at 151-152. In concluding that PSRs are not covered by the "outside salesman" exemption, the Department did not reverse or alter its prior views. It simply applied longstanding principles to a particular category of employees. Respondent, by contrast, seeks to rewage a battle that regulated employers lost initially in 1940, again in 1949, and most recently in 2004.

a. The FLSA was enacted in 1938. That year, after consulting with representatives of industry and labor, the Administrator of the Wage and Hour Division of the Department of Labor issued a regulation that interpreted the "outside salesman" exemption to encompass "any employee who customarily and regularly performs his work away from his employer's place or places of business [and] who is customarily and regularly engaged in making sales as defined in [29 U.S.C. 203(k)]." 29 C.F.R. 541.4 (Supp. 1938). Although the regulation did not define what it meant to be "engaged in making sales," the contemporaneous definition of "sale" referred to an exchange of a commodity in return for value. See p. 18, *supra*. The regulation thus implicitly indicated that an employee qualified as an outside salesman only if he consummated his own sales.

Shortly thereafter, the Department made that requirement explicit. In both 1940 and 1947, the Department held hearings on proposed changes to the "outside salesman" regulation. On both occasions, regulated parties asked that "promotion men and others engaged in 'indirect sales' be included within the definition of 'outside salesman.'" *Weiss Report* 82; see *Stein Report* 46. Both times, the Department declined to expand the exemption to include promotional activities. See *id.* at 46-47; *Weiss Report* 82-84. The Department explained that "the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.* at 83; see *Stein Report* 46 ("A further group of persons for whom exemptions has been asked and who are admittedly not outside salesmen, in that they do not make actual sales, are sales promotion men * * * [who are] engaged in paving the way for salesmen.").

Following the 1947 hearings, the Department issued the making-sales and promotion-work regulations in 1949. Those regulations directly addressed the distinction between selling goods or services and promoting them. As relevant here, the making-sales regulation provided that an employee does not make a "sale" within the meaning of the "outside salesman" exemption unless he transfers title to the property at issue. See 14 Fed. Reg. at 7743 (codified at 29 C.F.R. 541.501(b) (Cum. Supp. 1962)). The promotion-work regulation stated that "promotional work" was exempt only if it was "actually performed incidental to and in conjunction with an employee's own outside sales or solicitations." 29 C.F.R. 541.504(a) (Cum. Supp. 1962); see 29 C.F.R. 541.504(b)(2) (Cum. Supp. 1962) ("[P]romotional activities designed to stimulate sales which will be made by someone else * * * must be considered nonexempt."). The promotion-work regulation gave examples of nonexempt employees, including a manufacturer's representative who solicited orders that were placed with the manufacturer rather than directly with the representative. See 29 C.F.R. 541.504(c)(4).

Those regulations remained virtually unchanged for 55 years.[4] In 2004, following notice-and-comment procedures, the Department revised the regulations that govern application of the "outside salesman" exemption. See 69 Fed. Reg. at 22,122 (revising 29 C.F.R. 541.500-504). Those revisions, however, did not make any relevant substantive changes.[5] The regulations continue to provide that an employee will be treated as an "outside salesman" only if his main duty is to sell goods or services away from the employer's place of business, 29 C.F.R. 541.500(a)(1)(i)-(ii); that selling goods or services means transferring title to property (in the case of goods) or taking orders (in the case of services), 29 C.F.R. 541.501(b) and (d); and that promotional work is exempt only if it is incidental to an employee's own outside sales, 29 C.F.R. 541.503. Viewed as a whole, the current regulations preserve the distinction between sales work and promotional work that the Department first articulated in the 1940s.

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[4] In 1963 and 1973, the Department made minor technical amendments to the pertinent regulations. See 28 Fed. Reg. 14,424 (Dec. 28, 1963); 38 Fed. Reg. 11,407 (May 7, 1973). Those amendments are not at issue here.

[5] Whereas the general regulation formerly required that an employee be "employed for the purpose of" making sales, 29 C.F.R. 541.500(a) (1979), it now requires that an employee's "primary duty" be making sales, 29 C.F.R. 541.500(a)(1). The changes to the making-sales and promotion-work regulations were even more minor: the Department reworded them slightly for clarity and removed some outdated examples. Compare 29 C.F.R. 541.501(d)-(e) (1979), with 29 C.F.R. 541.501(d); and compare 29 C.F.R. 541.504(b)-(c) (1979), with 29 C.F.R. 541.503(b)-(c).

In adhering to its traditional approach, the Department discussed, but declined to adopt, the suggestion of several commenters that the distinction between sales and promotional activities be abandoned. See 69 Fed. Reg. at 22,162. The United States Chamber of Commerce, for instance, urged that "promotional activities, even when they do not culminate in an individual sale, are nonetheless an integral part of the sales process." *Ibid.* The Department responded in the regulatory preamble that it did not "intend to change any of the essential elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services." *Ibid.* The Department concluded that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Ibid.*

b. The FLSA covers, *inter alia*, "an enterprise engaged in commerce or in the production of goods for commerce," 29 U.S.C. 207(a)(1), which is defined in part as an enterprise that has "employees handling, selling, or otherwise working on [interstate] goods or materials," 29 U.S.C. 203(s)(1)(A)(i). As respondent pointed out at the certiorari stage (Br. 5), the Department has defined the term "selling" in Section 203(s) to include "any work that, in a practical sense[,] is an essential part of consummating the 'sale' of the particular goods." 29 C.F.R. 779.241. It is "not surprising," however, that the Department has broadly interpreted the term "selling" in the enterprise-coverage provision, in light of "the well settled principle that the coverage provisions of the Act are to be liberally construed." *Wirtz* v. *Keystone Readers Serv., Inc.*, 418 F.2d 249, 261 n.8 (5th Cir. 1969);

see *Ruggeri* v. *Boehringer Ingelheim Pharms., Inc.*, 585 F. Supp. 2d 308, 318 (D. Conn. 2008). The Department has taken a narrower but equally reasonable approach in interpreting the "outside salesman" exemption. See *Keystone Readers Serv., Inc.*, 418 F.2d at 261 ("Given the rule that coverage provisions are to be liberally construed while exemptions are to be narrowly construed, definitions for one purpose would seem ill suited to the other.").

c. The court of appeals relied on a former Department of Labor publication that compiled basic descriptions of various jobs. See Pet. App. 34a (quoting U.S. Employment Service, *Dictionary of Occupational Titles* (4th ed. 1991) (*Dictionary*)). The court's reliance on that publication was misplaced. The *Dictionary* is no longer in effect, having been superseded by an online database called the Occupational Information Network (or O*NET). In addition, the *Dictionary* was published by the U.S. Employment Service, not the Wage and Hour Division. Accordingly, it contains an express disclaimer stating that the *Dictionary*'s "occupational information * * * cannot be regarded as determining standards for any aspect of the employer-employee relationship" and "should not be considered a judicial or legislative standard for wages, hours, or other contractual or bargaining elements." *Dictionary* xiii.

Moreover, the *Dictionary*'s definition of "pharmaceutical detailer" is extremely broad. It encompasses any employee who "[p]romotes use of and sells ethical drugs and other pharmaceutical products to physicians, [dentists], hospitals, and retail and wholesale drug establishments." *Dictionary* § 262.157-010. That definition likely reflects the fact that some detailers formerly performed both promotional and sales work, promoting drugs to physicians and selling them to hospitals and retailers. See Pet. Br. 49. Even now, pharmaceutical companies may employ certain detailers who actually make sales to retail or wholesale drug establishments. Cf. note 1, *supra*. But the *Dictionary*'s oblique suggestion that such detailers may exist provides no support for respondent's reading of the FLSA, under which detailers who do *not* make sales would nevertheless be treated as "outside salesm[e]n."

3. *The Department has never acquiesced in the view that PSRs are outside salesmen*

According to the court of appeals, until the Department filed its amicus brief in *Novartis* in October 2009, it had acquiesced for approximately 70 years in employers' treatment of PSRs as outside salesmen. See Pet. App. 33a. That is incorrect. In suits brought under the FLSA, Congress has provided an affirmative defense for any employer who "pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on * * * any administrative practice or enforcement policy" of "the Administrator of the Wage and Hour Division of the Department of Labor." 29 U.S.C. 259(a)-(b) (2006 & Supp. IV 2010). A regulation implementing that provision states that "before it can be determined that an agency actually has a practice or policy to refrain from acting, there must be evidence of its adoption by the agency through some affirmative action establishing it as the practice or policy of the agency." 29 C.F.R. 790.18(h). Here, neither the court of appeals nor respondent has identified any "affirmative action" taken by the Administrator establishing an agency "practice or policy" of treating PSRs as outside salespeople. See 29 C.F.R. 790.18(g) (requiring that the practice be with respect to the class of employees at issue).

The court of appeals may have inferred acquiescence from the apparent absence of any prior Department enforcement action alleging a violation of the FLSA's overtime requirement with respect to PSRs. Section 259 and its implementing regulations make clear, however, that no inference of legality may be drawn from the Department's mere failure to initiate enforcement proceedings. See, *e.g.*, 29 C.F.R. 790.18(h) ("A failure to inspect might be due to any one of a number of different reasons."); see also *Heckler* v. *Chaney*, 470 U.S. 821, 831-832 (1985) ("[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise."). The court of appeals' inference was particularly unwarranted because the Department had repeatedly affirmed the general rule that promotional workers who facilitate sales by others are not exempt "outside salesm[e]n." The Department's recent amicus briefs do not reflect any change in agency position. Rather, when private lawsuits required lower courts to address the FLSA's application to PSRs, the agency reasonably sought to ensure that its own views on the disputed interpretive questions were accurately understood.[6]

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[6] The court of appeals also pointed to "industry practice and prevailing customs" that treat PSRs like salesmen. Pet. App. 27a. This Court has held that industry practice and custom do not define or circumscribe employees' rights under the FLSA. See *Barrentine* v. *Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 (1981). The pharmaceutical industry cannot convert PSRs into outside salesmen simply by paying them incentives or allowing them to keep their own schedules. See *Novartis*, 611 F.3d at 155 ("To the extent that the pharmaceutical industry wishes to have the concept of 'sales' expanded to include the

C. The Department's Interpretation Of Its Own Regulations Is Entitled To Judicial Deference

The Department's regulations make clear that the FLSA's "outside salesman" exemption is limited to employees who consummate their own sales. To the extent the Court finds the regulations ambiguous, however, the Department has repeatedly interpreted those rules not to exempt promotional work of the type performed by petitioners. Because the Department's interpretation is not plainly inconsistent with the regulations and represents the Department's considered judgment on the proper scope of the exemption, it is entitled to controlling weight under *Auer* v. *Robbins*, 519 U.S. 452 (1997).

1. Relying on *Gonzales* v. *Oregon*, 546 U.S. 243 (2006), the court of appeals held that the Department's interpretation of its own regulations is not entitled to *Auer* deference because the regulations simply paraphrase the language of the FLSA. See Pet. App. 21a-24a. In reaching that conclusion, the court addressed only the general "outside salesman" regulation. Although that regulation defines a salesman by reference to "making sales" under 29 U.S.C. 203(k), it does more than merely incorporate the statutory text. It also specifies that "[i]n determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's *own outside sales or solicitations* * * * shall be regarded as exempt outside sales work." 29 C.F.R. 541.500(b) (emphasis added). The regulation thus presumes that the "primary duty of an outside sales employee" is making "the

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promotional activities at issue here, it should direct its efforts to Congress, not the courts.").

employee's own outside sales or solicitations," which is an elaboration on the statutory language.

More importantly, the court of appeals ignored two other regulatory provisions—the making-sales and promotion-work regulations—that elaborate on the language of the FLSA and that bear directly on the question presented here. The making-sales regulation provides that an employee does not make a "sale" within the meaning of the "outside salesman" exemption unless he transfers title to the property at issue. See 29 C.F.R. 541.501(b). The promotion-work regulation states that "promotional work" is exempt only if it is "actually performed incidental to and in conjunction with an employee's own outside sales or solicitations," 29 C.F.R. 541.503(a), and that "[p]romotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work," 29 C.F.R. 541.503(b). As the Second Circuit observed, the regulations "defining the term 'sale' as involving a transfer of title, and defining and delimiting the term 'outside salesman' in connection with an employee's efforts to promote the employer's products, do far more than merely parrot the language of the FLSA." *Novartis*, 611 F.3d at 153; cf. *Harrell* v. *USPS*, 445 F.3d 913, 925 (7th Cir.) ("It is true that part of the implementing regulation * * * follows closely the language of the statute; however, the regulation goes beyond the mere recitation of the statutory language and speaks to the issue presented in this case."), cert. denied, 549 U.S. 1095 (2006).

2. The Department contemporaneously interpreted the regulations not to exempt promotional work of the type performed by petitioners. In the 2004 preamble to the current regulations, the Department emphasized that the 2004 revisions did not "change any of the essen-

tial elements required for the outside sales exemption, including the requirement that the outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services." 69 Fed. Reg. at 22,162. "Employees have a primary duty of making sales," the preamble explained, "if they 'obtain a commitment to buy' from the customer and are credited with the sale." *Ibid.* (quoting *Weiss Report* 83). Relying on the 1940 *Stein Report*, the preamble further observed that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Ibid.* The preamble also reiterated the Department's statement in 1949 that "[i]n borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.* at 22,162-22,163 (quoting *Weiss Report* 83).

In relying on preamble language (also drawn from the 1940 *Stein Report*) that an outside salesman must "in some sense" make sales, Pet. App. 28a (quoting 69 Fed. Reg. at 22,162), the court of appeals misunderstood the context in which that language appeared. During the 2004 rulemaking, various commenters, including the United States Chamber of Commerce and the National Association of Manufacturers, expressed concern that "outside sales employees may no longer be exempt under the proposed regulations because they no longer execute contracts or write orders due to technological advances in the retail business." 69 Fed. Reg. at 22,162; see *ibid.* ("[D]ue to advances in computerized tracking of inventory and product shipment, the sales of manufactured goods are increasingly driven by computerized recognition of decreases in customer's inventory, rather than specific face-to-face solicitations by outside sales employees."). The Department agreed that "technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales." *Ibid.*

When the Department stated that an outside employee must "in some sense" make sales, it did not suggest that every employee whose actions *facilitate* sales is a "salesman." Because every employee of a manufacturing company presumably contributes in some fashion to sales of the company's products, treating facilitation as indicative of "salesman" status would subvert Congress's evident intent to single out a discrete class of workers. Rather, the agency simply recognized that an employee may properly be regarded as an "outside salesman" if he obtains a commitment to buy and is credited by his employer with a sale, even if it is the customer "who types the order into a computer system and hits the return button." 69 Fed. Reg. at 22,163. In accommodating the modern reality that salesmen may make sales without executing written contracts or orders, the Department did not discard—indeed, it expressly retained—the longstanding bedrock requirement that an outside salesman's efforts must be directed "toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Ibid.*

3. The Wage and Hour Division (WHD) has issued opinion letters addressing the applicability of the "outside salesman" exemption to other classes of employees. The Division has consistently concluded that when such employees do not consummate sales transactions by obtaining commitments to buy from customers, they are

not exempt as outside salespeople under the FLSA. See WHD Opinion Letter 2006-16, 2006 WL 1698305 (May 22, 2006) (professional fundraisers who solicited promises of charitable donations were not exempt outside salespeople); WHD Opinion Letter, 1999 WL 1002391 (Apr. 20, 1999) (same for college recruiters); WHD Opinion Letter, 1998 WL 852683 (Feb. 19, 1998) (same); WHD Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994) (same for organ-donation solicitors).

4. Until the recent set of private actions brought by employees, the Department had not addressed the applicability of the "outside salesman" exemption to PSRs. In this and other cases, however, the Secretary has filed amicus briefs arguing, consistent with Department regulations, that PSRs are not "outside salesm[e]n" for purposes of the FLSA because they promote pharmaceutical products rather than selling them. This Court recently reaffirmed that deference is due "to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulation[s] or there is any other reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) (internal quotation marks and citations omitted; brackets in original); see *Chase Bank USA, N.A.* v. *McCoy*, 131 S. Ct. 871, 880 (2011); *Federal Express Corp.* v. *Holowecki*, 552 U.S. 389, 397 (2008). Neither of those conditions is present here. The position expressed in this and other amicus briefs reflects a straightforward application of the regulatory text and of the Department's longstanding approach to the "outside salesman" exemption, and it is accordingly entitled to deference under *Auer*.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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AMICUS CURIAE BRIEF

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In the

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER
and FRANCK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP., D/B/A,
GLAXOSMITHKLINE,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether deference is owed to the Secretary's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations; and

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

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IDENTITY AND INTEREST OF AMICI CURIAE

Amicus, Center for Constitutional Jurisprudence[1] is dedicated to upholding the principles of the American Founding, including the structure of government set out in the Constitution. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance, including *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); and *United States v. Morrison*, 529 U.S. 598 (2000). The Center is vitally interested in effective judicial oversight of the exercise of power by administrative agencies – that oversight requires active judicial review of the interpretation and application of ambiguous regulations.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Petitioners have filed a blanket consent and a letter from respondent evidencing consent has been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Last term, Justice Scalia wrote separately in *Talk America, Inc. v. Michigan Bell Telephone Co.*, __ U.S. __, 131 S.Ct. 2254, 2266 (2011), to express concern that *Auer* deference was "contrary to fundamental principles of separation of powers." Those concerns have merit. The plan of government outlined in the Constitution relies on the separation of powers to protect individual liberty. Further, the plan relies on each branch of government to jealously guard its powers in order to prevent encroachment. This Court has recognized that it has not only specific powers under this arrangement, but also a duty to exercise those powers.

Granting "controlling deference" to an Executive agency's interpretation of its own regulations is an abdication of that duty. Unlike *Chevron* deference to an agency's regulations that are enacted pursuant to express or implied congressional delegations, the deference at issue in this case does not involve the courts in the selection of competing policy choices. Instead, active judicial review will serve Congress' aims that agencies promulgate their policies pursuant to procedures that provide for public participation and appropriate judicial review.

ARGUMENT

I. SEPARATION OF POWERS IS ONE THE MOST IMPORTANT STRUCTURAL FEATURES OF THE CONSTITUTION

There can be little debate that separation of powers was considered an essential component in the plan of government by the Framers. Even before a national constitution was ever considered, the

Founding generation made sure that newly formed state governments were based on separated powers.

In Virginia, the Fifth Revolutionary Convention approved the Declaration of Rights in June of 1776 that insisted that "legislative and executive powers ... should be separate and distinct from the judiciary. Vir. Dec. of Rights, 1776, in The Documentary History of the Ratification of the Constitution, Vol. VIII at 530 (Madison State Historical Society of Wisconsin, 1998). The new Virginia Constitution adopted that same month also required that the branches of government be "separate and distinct" and commanded that they not "exercise powers properly belonging to the other." Vir. Const. of 1776, in The Documentary History of the Ratification of the Constitution, Vol. VIII at 533.

The Massachusetts Constitution of 1780 contained a similar provision, and added the purpose of separated powers "to the end it may be a government of laws, and not men." Mass. Const. of 1780, Part I, Art. XXX, in The Documentary History of the Ratification of the Constitution, Vol. IV at 445.

The denial of separated powers was among the complaints against the crown listed in the Declaration of Independence. 1 Stats 1 (noting obstruction of the administration of justice and making judges "dependent on his will alone"). Justice Story notes that the first resolution adopted by the Constitutional Convention in 1787 was for a plan of government consisting of three separate branches of government. Joseph Story, Commentaries on the Constitution, section 519, 1833 (Little Brown & Co. 1858).

This theory that separation of powers is necessary to prevent arbitrary government was not a new idea. The Framers relied heavily on the writings of Montesquieu, Blackstone, and Locke on this issue. John Adams quoted from Montesquieu's Spirit of the Laws on this point in his response to critics of the American Constitution. John Adams, A Defense of the Constitutions of Government of the United States of America, Letter XXVII 1797 (Lawbook Exchange, Ltd. 2001), vol. 1 at 154.

Indeed, there was no debate about whether the separation of powers would be a feature of the new government. Instead, the debate was whether the proposed new constitution separated those powers enough.

James Madison explained that a mere prohibition on exercising the powers of another branch of government was not sufficient. Such a prohibition was a mere "parchment barrier." Federalist 48, The Federalist Papers, George W. Carey and James McClellan, editors, (Gideon ed. 2001) at 256. Thus, the Constitution was designed to give the members of each branch the power to resist encroachment on their powers. Federalist 51, The Federalist Papers, *supra* at 268-69. Because the three powers of government were not equal, the constitutional design does not have a pure separation of powers. To accomplish an equilibration of power, the Constitution gives each branch some limited role in the operation of the other branches. *Id.* Thus, the Executive can veto legislation and the judiciary has the power to determine the meaning of laws and whether they are consistent with the Constitution. Leaving interpretation of laws to the lawmaking branch, according to Blackstone, is an invitation to "partiality and oppression." 1 William Blackstone, Commentaries on the Laws of England, Book 1 section 2, University of Chicago Press (1979) at 58. Sensible to this danger, the Framers vested these powers in the judicial branch.

The judicial power proposed in the new Constitution did engender some controversy. During the debates over ratification of the Constitution, the Anti-Federalists argued that the judicial branch had too much power. *E.g.*, Brutus No. XI, in Debate on the Constitution, Bernard Bailyn, editor, (Library of America, 1993) at 129; Brutus No. XII, *supra* at 171. Alexander Hamilton argued, however, that this power of judicial review was necessary to check the political branches of government. Federalist 78, The Federalist Papers, *supra*, at 405. A robust judicial power is necessary if the courts are to serve as "bulwarks" for liberty. *Id.* This requires that judges have the power to "declare the sense of the law." *Id.*

From the early days of the republic, this Court has agreed that the courts have both the power and duty to interpret the law. Most famously in *Marbury v. Madison*, 5 U.S. (Cranch) 137, 177 (1803), this Court declared "[i]t is emphatically the province and duty of the judicial department to say what the law is."

Later cases have relied on these principles to reject a call for deference to legal interpretations by the Department of Justice. *Miller v. Johnson*, 515 U.S. 900, 922-23 (1995). Each branch of government must support and defend the Constitution and thus must interpret the Constitution. The Courts may not, however, cede their judicial power to interpret the laws to the Executive. See *United States v. Nixon*, 418 U.S. 683, 704 (1974).

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power. Federalist 51, The Federalist Papers, *supra* at 269. This explains why this Court in *Marbury* did not simply declare legal interpretation to be a judicial power. Instead, the Court ruled that it was the duty of the judiciary to exercise that power. *Marbury*, 5 U.S. at 177. In order to keep the political branches in check, this Court may not surrender its power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to "partiality and oppression." The rule of controlling deference to agency interpretation of ambiguous regulations, however, is a surrender of judicial power and a decision to cede to the Executive the judicial power.

II. *SEMINOLE ROCK* AND *AUER* DEFERENCE ARE NOT CONSISTENT WITH THE SEPARATION OF POWERS DESIGN OF THE CONSTITUTION

The petitioners in this action are seeking a ruling that courts must defer to an agency interpretation of an ambiguous regulation. In other words, the courts must cede their power and duty "to say what the law is" to the Executive. This argument for deference begins with this Court's ruling in *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). In that case, the Court considered arguments over the interpretation of a regulation regarding the General Maximum Price Regulation. There, the Court stated that the "ultimate criterion" for meaning of a regulation is "administrative interpretation, which becomes of controlling weight unless it is plainly erroneous. *Id.* at 414. Later cases have refered to this as *Auer* deference, for the Court's later decision in *Auer v. Robbins*, 519 U.S. 452 (1997).

This rule of controlling deference was explained in *Martin v. Occupational Safety & Health Comm'n*, 499 U.S. 144 (1991). Deference was necessary, according to this Court, because application of the regulation "to complex or changing circumstances" requires an agency's "unique expertise and calls upon its policymaking prerogatives." *Id.* However, an agency's "policymaking prerogatives" are exercised at the time the regulation is written. If an agency discovers that it needs a new or different policy, its only option is to draft a new or different regulation – and then to defend that regulation as consistent with the congressional delegation. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 41 (1983).

A. *Seminole Rock* and *Auer* deference do not rest on the same justifications for *Chevron* deference

The explanation in *Martin* for the deference afforded under *Seminole Rock* and *Auer* echoes some of the rationale given for deferring to agency construction of a statute under *Chevron USA Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). The Court in that case deferred to administrative interpretation of a statute where Congress had "left a gap for the agency to fill." *Id.* at 843-44. Where that is the case, the agency's decision on the direction a regulation should take – i.e., on how to implement a statute, is a matter of policymaking that Congress has left to the agency.

In later cases, this Court distinguished agency interpretations contained in notice and comment rulemaking from those contained in guidelines and opinion letters. *Christiansen v. Harris County*, 529 U.S. 576, 587 (2000). Deference under *Chevron* is only available where Congress has given the agency the power to issue rulings "carrying the force of law" and the interpretation at issue "was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001). This limitation is based on what authority can be implied from the congressional delegation of power. The question is whether "Congress would expect the agency to be able to speak with the force of law" in addressing an ambiguity in the statute. *Id.* at 229; *Gonzales v. Oregon*, 546 U.S. 243, 255-56 (2006).

Chevron deference, then, is based on either an express or implied delegation by Congress to the agency to "fill the gaps" in a statutory enactment. The existence of this gap-filling authority is indicated where Congress has granted the agency the power to issue rulings (either regulations or orders) with the "force of law." Deference is required in these instances so that courts do not substitute their own policy preferences for those of the agency tasked to administer the statute. *Chevron*, 467 U.S. at 865.

This process is far different from an agency interpretation of its own regulation. In the first place, the agency interpretation cannot be an exercise of its "policymaking" authority. Any such authority was exercised in the promulgation of the regulation. The regulation receives deference, in part, because of the formal process undertaken to promulgate the rule. The interpretation of the regulation, however, undergoes no such process. It may be an opinion letter, as was the case in *Christiansen*, or it may be an amicus brief as in *Auer* and the instant action. In neither case, however, has the agency undertaken any formal process that would include an opportunity for public comment or for judicial review. Judicial review is particularly important when an agency changes direction, as is alleged to be the case here. *See State Farm*, 463 U.S. at 41.

Further, the agency's interpretation of its own ambiguous regulation is not part of the express or implied delegation of power from Congress. The statutory enactment may give the agency the authority to use delegated lawmaking power to issue regulations. There is, however, no implied authority to change the meaning of that regulation through an informal "interpretation."

Finally, there is no legal basis for judicial deference. Unlike the situation in *Chevron*, the Court is not inserting itself into the process for selection of a particular policy to implement Congressional intent. That procedure has already run its course and the regulation stands as the agency's choice of the policy to pursue. At issue in the interpretation of an ambiguous regulation is simply the judicial function of deciding the meaning of a legal text.

B. This Court Should Overrule *Seminole Rock* and *Auer*

As outlined above, *Chevron* deference does not raise concerns for separation of powers. Under *Chevron*, the Court does not cede its power to interpret the law because Congress has delegated a part of the lawmaking function to an administrative agency (with policy guidance). Until the agency has filled in the gaps of the law through the exercise of its delegated lawmaking power, the statute may not yet be complete in the sense that there are policy choices still to be made. These policy choices are delegated to the administrative agency – they are not part of the judicial function.

The judicial function is to say what the law is. Once the agency has issued a regulation that carries the force of law, it then falls to the courts to interpret the regulation. In other words, it is the judiciary's job "to declare the sense of the law." Federalist 78, *supra* at 405.

Granting deference to the agency to interpret its own ambiguous regulation cedes the judicial function to the Executive. This is an invitation to "partiality and oppression." It is also an invitation to agencies to avoid the expense and bother of rulemaking proceedings when it wants to change its policy. Instead of going through the time to allow public participation and judicial review of the change, it can instead merely change how it interprets its existing regulations.

Denying "controlling deference" to an agency interpretation does not mean that the courts must ignore long-standing agency interpretations and practices. Those remain important interpretative tools. Yet the job of interpreting the legal text will remain with the courts. To do otherwise results in a failure of the duty of the judicial branch of government "to declare the sense of the law" and thus violates the separation of powers required by the Constitution.

CONCLUSION

To the extent that this Court's decisions in *Seminole Rock* and *Auer* require controlling deference to an agency interpretation of a regulation, those decisions should be overruled.

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IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER, *et al.*,

Petitioners,

v.

SMITHKLINE BEECHAM CORPORATION
dba GLAZOSMITHKLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF CERTIFIED CLASS OF PHARMACEUTICAL REPRESENTATIVES FROM JOHNSON & JOHNSON AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

Amicus curiae are a group of Pharmaceutical Representatives ("PR") who were, or are, employed by Johnson & Johnson subsidiary Ortho-McNeil, Inc., Janssen Ortho-McNeil Primary Care, Inc., and Janssen, L.P. ("Ortho-McNeil"). The PRs filed two cases alleging that Ortho-McNeil misclassified them, and a class of similarly situated PRs, as exempt from overtime wages under federal and state law. The District Court certified a nationwide "opt-in" collective action under the Fair Labor Standards Act of 1938 ("FLSA"). The parties thereafter cross-moved for summary judgment of Ortho-McNeil's affirmative defense that the PRs are covered by the outside salesperson exemption under the FLSA. Ortho-McNeil won.

The District Court issued two opinions containing, verbatim, the same analysis of the FLSA outside sales exemption. Delgado v. Ortho-McNeil, United States District Court Case No. 8:07-cv-00263 and Yacoubian v. Ortho-McNeil, United States District Court Case

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae states no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus, or its counsel, made a monetary contribution intended to fund its preparation or submission. A letter of consent from the parties to the filing of this brief has been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

No. 8:07-cv-00127. Upon appeal, the Ninth Circuit consolidated the briefing and arguments in these two related cases with Christopher v. SmithKline Beecham Corp. (11-204). After oral argument, the Ninth Circuit took all three matters under submission. However, the Ninth Circuit only issued an opinion in *Christopher* and withdrew submission of its ruling in both *Delgado* and *Yacoubian* pending a decision from another panel in the Ninth Circuit on a related California state law issue. To date, the Ninth Circuit has yet to issue an opinion in the consolidated *Delgado* and *Yacoubian* matters even though its ruling on the FLSA outside salesperson exemption will surely be the same as that in *Christopher*.

SUMMARY OF ARGUMENT

Promotion work is a massive undertaking for pharmaceutical companies, which spend billions of dollars a year and have hundreds of thousands of pharmaceutical representatives make weekly or monthly one-on-one visits to prescribers nationwide. During their one-on-one visits to prescribers, PRs distribute product samples along with branded promotional materials and pamphlets about the different conditions their particular products can be used to treat. The central objective is to provide medical information to promote brand loyalty. The question before the Court here is whether these employees are "making sales" as defined by the FLSA. They are not. More to the point, the Department of Labor has given its opinion on the issue explaining why PRs are not outside salespersons under the FLSA.

However, the Ninth Circuit declined to give any deference to the DOL.

This brief highlights some of the problems with the Ninth Circuit's rational for eschewing DOL deference because the Secretary had "acquiesced" to the sales practices of the pharmaceutical industry for over 70 years. First, the pharmaceutical companies' arguments -- that indirect sales are good enough for the exemption – have, in fact, been considered and rejected by the DOL in the rules-making process from the beginning. Second, the DOL and District Courts throughout the nation have consistently distinguished between promotion and sales work. And finally, the DOL's position with regard to "outside sales" has always been consistent. The pharmaceutical companies cannot feign ignorance.

In the end, PRs are not employed to sell a product. They are employed to engage in a two-way balanced and objective dialogue between the physician and drug companies about the scientifically-proven benefits and risks of pharmaceutical drugs with the express purpose of enhancing the practice of medicine. That is not sales. Additionally, because PRs do not consummate sales, take orders, or form contracts of any kind, they do not fall within the plain language of the FLSA statute and regulations. The Ninth Circuit is wrong and should be reversed.

I. The Companies' Arguments Have Already Been Considered and Rejected in the Rules-Making Process

A. Promoters and Persuaders Do Not Fall Within the Outside Sales Exemption

Virtually from the inception of the FLSA in 1938, business interests have pressed to include in the outside sales exemption, those employees like PRs who are "missionary men" -- i.e., promoters who do not consummate their own sales. For over seventy years, the DOL has refused these petitions. In the Department of Labor's 1949 Report and Recommendations on Proposed Revisions of Regulations, the DOL specifically considered and rejected the argument that employees engaged in "indirect sales" qualify for the outside sales exemption under section 541.5 of the regulations. The presiding officer rejected these suggestions primarily because these promotion men are not employed for the purpose of making sales. *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor (June 30, 1949) ("Weiss Report") at 82.

B. Strict Definition of Sales

When the FLSA's outside sales employee exemption was first defined and interpreted by the Wage and Hour Division, early questions were raised concerning what qualified as "sales" under this exemption. As described in the 1940 Report and Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition:

> [T]he Division has expressed the opinion that the word "sales" as defined in section 3(k) ***does not cover*** certain activities which are popularly described as sales. Particular reference is made to the selling of time on the radio, the solicitation of advertising for newspapers and other periodicals and the solicitation of freight for railroads and other transportation agencies. ... Accordingly, it is deemed desirable to add a further clause which will specifically include within the exemption persons engaged in selling activities of this type. (emphasis added)

However in slightly extending the scope of the term "outside salesman" to include such employees, it was not intended to broadly include persons who in a very loose sense are sometimes described as selling a "service."

C. Promotional Work Does Not Constitute "Sales"

The DOL has squarely rejected the argument that promotional work that assists someone else in making a sale constitutes work that falls within the outside sales exemption. "Executive, Administrative, Professional...Outside Salesman," Redefined, Wage and Hour Division, U.S. Dep't of Labor, Report and Recommendations, by Harold Stein, Presiding Officer (October 10, 1940) ("Stein Report") (emphasis in original).

In the Stein Report, the DOL stated that a manufacturer's "promotion and missionary men," whose job is to convince retailers to buy from wholesalers (jobbers) (who in turn buy from the manufactures), do not fall within the "outside salesman" exemption.

> It should be noted that frequently the promotion man is primarily interested in sales ***by*** the retailer, not ***to*** the retailer. Thus, inasmuch as the promotion man's earnings are normally not directly related to his working time, as is customarily the case with outside salesmen, it is doubtful that the nature of his work requires or justifies an exemption from the provision of the act. In any event it is clear that it would be an unwarrantable extension of the Administrator's authority to describe as a salesman anyone who does not in some sense make a sale.
>
> *See* Stein Report at 46 (emphasis in original).

Over the years, requests have been made to include certain professions within the outside sales exemptions. These requests include employees such as service men, installation men, delivery-men, and collectors.[2] Proponents claim that these employees are engaged in selling their employer's "service" to the person from whom they obtain their goods. All of these requests were rejected as lying outside the scope of the exemption. See "Executive, Administrative, Professional . . . Outside Salesman" Redefined, Wage and Hour Division, U.S. Dep't of Labor, Report and Recommendations of the Presiding Officer (Harold Stein) at Hearings Preliminary to Redefinition, at pp. 45-46 (Oct. 10, 1940).

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[2] The pharmaceutical companies have never asked the DOL to include their PRs within the outside salesperson exemption.

The regulations were again revised in 1949 to include persons engaged in *obtaining* orders or contracts for "services" in the definition of outside sales, but the remaining underlying concepts were not changed. *See* Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, at pp. 81-82 (June 30, 1949). Accordingly, when applying these principles in response to requests for opinions, the Division has concluded, for example, that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations. *See* WH Opinion Letter August 19, 1994.

II. The DOL and Courts Have Consistently Distinguished Between Promotion and Sales

As explained above, the DOL has always distinguished between promotion and sales and has deemed promotion work as non-exempt from the overtime regulations. The Department's regulations define the statutory phrase "outside salesman" as including "any employee . . . [w]hose primary duty is . . . making sales within the meaning of section 3(k) of the Act, or . . . obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." 29 C.F.R. § 541.500(a)(1)(i)-(ii).

"Primary duty" means "the principal, main, major, or most important duty that the employee performs," 29 C.F.R. § 541.700(a), and section 3(k) of the FLSA defines "[s]ale" as including "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k); *see* 29 C.F.R. § 541.501. The Department's regulations further explain that "[s]ales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property," and that "'services' extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order." 29 C.F.R. §§ 541.501(b) and (d).

The regulations explicitly distinguish promotional work from exempt outside sales work, clarifying that:

> [p]romotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it was performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. 29 C.F.R. §541.503(a).

In other words, "[p]romotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made ***by someone else*** are not exempt outside sales work." 29 C.F.R. § 541.503(b) (emphasis added). While the parties agree that a layperson's understanding of the term "sell" is not relevant to the legal issue, it is incorrect to assert that the legal question is whether PRs were "selling." The term "selling" does not appear in the outside sales exemption, which instead holds that employees must be "making sales." 29 C.F.R. § 541.500(a)(1)(i). The verb "to sell" and the gerund "selling" are colloquial terms that capture a range of persuasive activities, many of which fall outside the exemption. For example, attorneys attempt "to sell" (read: "persuade") the court on their arguments, just as the presidential contenders are "selling" (read: "persuading") their candidacies. But these truisms do not make lawyers or politicians "salespeople" under the FLSA. It is the broad, colloquial use of the word selling that the employers here advocate.

By contrast, the noun "sale," the word actually used in the outside sales exemption regulating, is much narrower. "Sale" is categorically defined in the FLSA as "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). A "sale" refers to transactions for value, not the marketing and promotion of those transactions in a general or colloquial sense. Thus, the phrase "making sales" under the exemption is considerably narrower than the conversational phrase "selling."

Given these clarifying regulations, PRs do not meet the primary duties test for the outside sales exemption. They do not do not sell any drugs or obtain any orders for drugs, and can at most obtain from the physicians a non-binding commitment to prescribe the company's drugs to their patients when medically appropriate. They do not meet the regulations' requirement that their primary duty must be "making sales." 29 C.F.R. § 541.500(a)(1)(i).

If the PRs are not selling drugs, the logical question sometimes turns to "who then is selling pharmaceutical drugs?" The actual sale of a company's drugs usually occurs between the company and distributors -- and then to the pharmacy. Insofar as the PRs' work increases the company's sales, it is non-exempt promotional work "designed to stimulate sales that will be made by someone else." 29 C.F.R. § 541.503(b). As a District Court recently concluded, "[t]he regulations *dictate* that if an employee does not make any sales and does not obtain any orders or contracts, then the outside sales exemption does not apply." *See Jirak v. Abbott Labs., Inc.,* 716 F.Supp.2d 740, (N.D. Ill. 2010) (emphasis added).

To the extent that there is any ambiguity in the Department's regulations, the Department's Preamble to the 2004 final rule ("Preamble"), Wage and Hour Division ("WH") opinion letters, and WH Field Operations Handbook (1965) ("FOH") provide additional guidance. The Preamble emphasizes that the Department "does not intend to change any of the essential elements required for the outside sales exemption, including the requirement that the ***outside sales employee's primary duty must be to make sales or to obtain orders or contracts for services***." 69 Fed. Reg. at 22,162 (emphasis added).

"Employees have a primary duty of making sales if they 'obtain a commitment to buy' from the customer and are credited with the sale." *Id.* The Preamble further notes that "[e]xtending the outside sales exemption to include all promotion work, whether or not connected to an employee's own sales, would contradict this primary duty test." *Id.* Indeed, the exemption does not extend to employees engaged in paving the way for salesman or assisting retailers. *Id.* "In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.'" 69 Fed. Reg. at 22,162–22,163 (quoting Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 83 (June 30, 1949)).

It is undisputed that PRs are unable to obtain any sort of binding "commitment to buy" from the physician; they are in fact prohibited from doing so. *See In re Novartis Wage v. Hour Litigation*, 611 F.3d 141 (2nd Cir. 2010). ("The type of 'commitment' the Reps seek and sometimes receive from physicians is not a commitment 'to buy' and is not even a binding commitment to prescribe."). Nor can a PR consummate his or her own specific sale. A PR's marketing activities cannot be linked to a patient filling a prescription; thus, PRs cannot be directly credited with the sale.

The Department's Wage and Hour Division has consistently reiterated its position that a "sale" for the purposes of the outside sales exemption requires a *consummated transaction directly involving* the employee for whom the exemption is sought. For example, the Wage and Hour Division rejected the application of the outside sales exemption to individuals soliciting charitable contributions, noting that "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption. . . . [These] solicitors do not obtain orders or contracts for services or for use of your client's facilities for which a consideration will be paid." WH Opinion Letter FLSA 2006-16, 2006 WL 1698305 (May 26, 2006); *see also* WH Opinion Letter, 1994 WL 1004855 (Aug. 19, 1994) (concluding that soliciting organ and tissue donors by selling the concept of being a donor does not constitute "sales" under the regulations). Additionally, the Department's FOH states that "[a]n employee whose duty is to convince a dealer of the value of his employer's service to the dealer's customers and who does not in fact obtain firm orders or contracts from either the dealer or his customers is not making sales within the meaning of FLSA Sec. 3(k)." FOH § 22e04.

The distinction between obtaining commitments to buy and promoting sales by other persons has been respected in areas other than the pharmaceutical industry. *See In Re Novartis*, 611 F.3d 141, 153 (2nd Cir. 2010) (*citing Gregory v. First Title America, Inc.*, 555 F.3d 1300, 1309 (11th Cir. 2009) (employee who obtained commitments to buy her employer's title insurance service and was credited with those sales, and all of whose efforts were directed towards the consummation of her own sales and not towards stimulating sales for the employer in general, was an outside sales employee within the meaning of the FLSA and the regulations)); *Clements v. Serco, Inc.*, 530 F.3d 1224, 1228 (10th Cir. 2008) (civilian military recruiters who did not obtain commitments from recruits were not outside salesmen within the meaning of, *e.g.*, 29 C.F.R. § 541.504); *Wirtz v. Keystone Readers Service Inc.*, 418 F.2d 249, 253, 260 (5th Cir. 1969) ("student salesmen" were not outside sales employees where their promotional activities were incidental to sales made by others).

III. DOL's Position With Regard to "Outside Sales" Has Always Been Consistent

As explained above, the DOL's position has always been that a "sale" for the purpose of the outside exemption requires a consummated transaction involving the employee for whom the exemption is sought. For example, the DOL found that the outside sales exemption did not apply to "enrollment advisors" or college recruiters whose duties included "selling" the school and "inducing" student applicants, which resulted in the advisors personally obtaining a signed enrollment application and a nonrefundable $50.00 application fee. DOL Opinion Letter, 1998 DOLWH LEXIS 17, at *3, 7 (Feb. 19, 1998). The DOL explained that the activities of the position were more "analogous to sales promotion work" because "like a promotion person who solicits customers for a business," the college recruiter identifies customers and induces their application but does not "make a contractual offer of its educational services to the applicant." *Id.* at *7; *See also* DOL Opinion Letter, FLSA2006-16, 2006 WL 1698305, at *2 (May 22, 2006) (finding that "'selling the concept' of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption" because the solicitors do not obtain orders or contracts and the "exchange of a token gift for the promise of a charitable donation" is not a "sale").

The regulations dictate that if an employee does not make any sales and does not obtain any orders or contracts, then the outside sales exemption does not apply. *See* 29 C.F.R. § 541.500(a). Further, the regulations state that "promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work" and that "promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work." *Id.* at § 541.503(a)-(b). The latter regulation describes promotional activities generally, and does not distinguish between activities that are "incidental" versus "essential" to sales. *Id.* at § 541.503(b).

The DOL has consistently expressed its official opinion that outside sales exemption does not apply to employees who assist in promoting a good or service, but do not sell the good or service. Other recent examples include the following:

1. Tissue Recovery Coordinators who "sell[] the concept of tissue donation" in order to persuade institutions and individuals to "'buy into' the merits and benefits of tissue donation," are not exempt. The "selling of a concept does not constitute 'sales' within the meaning of the regulations." DOL Op. Letter 1994 WL 1004855 (Aug. 19, 1994).

2. Solicitors of Charitable Donations are not engaged in sales because "[s]oliciting promises of future charitable donations or 'selling the concept' of donating to a charity does not constitute 'sales' for the purposes of the outside sales exemption . . . the solicitors do not obtain orders or contracts for services . . . for which a consideration will be paid." DOL Op. Letter 2006 WL 1698305 (May 22, 2006).

The DOL has always made it clear that promotional activity does not constitute "making sales" within the meaning of the statute unless the employee also consummates an exchange of goods or services for value.

CONCLUSION

The typical outside salesman envisioned by the FLSA is an employee who acts independently and who earns commissions in direct proportion to the number of sales he makes – "He's a man way out there in the blue, riding on a smile and a shoeshine." Arthur Miller, Death of a Salesman (New York, 1958). True salespersons, as some Courts have noted, are limited "only by the range of their abilities and the dictates of their ambition." *Jewel Tea Co. v. Williams,* 118 F.2d 202 (10th Cir. 1941). But this model does not fit PRs.

The incentive system is, at best, a profit sharing arrangement designed to make employee compensation contingent on company -- not individual -- performance through periodic bonuses. And PRs do not work in an individualized, unstructured, and unsupervised fashion; just the opposite. Moreover, PRs are allowed to deliver only company-approved and provided materials and techniques and are constrained from utilizing many of the arrows in a prototypical salesperson's quiver: prices, discounts, competitor products, alternatives uses of the products, or even scientific studies of the product's effectiveness. That is a long way from the "smile and a shoeshine" model.

The DOL recognizes this reality and has concluded that PRs do not fall within the plain language of the FLSA statute and regulations because they are engaged in promotion work. The DOL, the sole agency charged with interpreting the FLSA, is entitled to deference. Therefore, the Ninth Circuit was wrong and should be reversed. The Second Circuit is correct.

Respectfully submitted,

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AMICUS
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IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER and
FRANK BUCHANAN,

Petitioners.

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A, GLAXOSMITHKLINE,

Respondent.

**On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

(1) Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's outside sales exemption and related regulations.

(2) Whether the Fair Labor Standards Act's outside sales exemption applies to pharmaceutical sales representatives.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

Many of the Chamber's members, including numerous members in the pharmaceutical industry, are subject to the Fair Labor Standards Act ("FLSA" or "Act"). Moreover, the Chamber's members must comply with a host of other statutory requirements that are subject to interpretation by federal agencies, and have a strong interest in those requirements remaining stable and clear. That stability and clarity, in turn, would be threatened by the approach to agency deference urged by Petitioners and the Government.

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both petitioners and respondent received timely notice of amicus' intent to file the brief, and consented to it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like any statute, the FLSA embodies a balance of legislative priorities. On the one hand, the Act protects the "health, efficiency, and general well-being of workers," *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981) (quoting 29 U.S.C. § 202(a)), by requiring employers to provide certain employees with benefits such as overtime pay, 26 U.S.C. §§ 206, 207. On the other hand, the Act includes numerous exemptions recognizing that FLSA protections are unnecessary and even ill-advised where employers and employees alike would benefit from alternative compensation practices. *See* 29 U.S.C. § 213(a)(1); *see also Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1363 (11th Cir. 1997) ("The chief financial officer of a company, for instance, would be less likely to [need statutory-required overtime pay] than a janitor or assembly linesman.").

One such exemption is for workers "employed ... in the capacity of outside salesman." 29 U.S.C. § 213(a)(1). As explained by one oft-cited analysis, this exemption reflects a practical assessment by Congress that, for multiple reasons, outside salespeople are among those less likely to benefit from a compensation structure premised on, and limited by, hourly overtime pay:

> There are no restrictions respecting the time [an outside salesperson] shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives

> commissions as extra compensation. He works away from his employer's place of business ... and his employer has no way of knowing the number of hours he works per day. To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman.

Jewel Tea Co. v. Williams, 118 F.2d 202, 207-08 (10th Cir. 1941).

The Act itself does not define the term "outside salesman." The statute does define the terms "sale" and "sell," and it defines them broadly. The Act provides that they include:

> [A]ny sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 203(k) ("Section 3(k)").

For its part, the Department of Labor ("DOL") has issued regulations that offer a broad definition of an "outside salesman" that invokes the statute's expansive definition of the term "sale." The regulations provide that an "outside salesman" is an employee who customarily and regularly works away from his or her employer's place of business and:

> Whose primary duty is:
>
> (1) *making sales* within the meaning of [29 U.S.C. § 203(k)].

29 C.F.R. § 541.501(a) (emphasis added). The regulations go on to note:

> Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible

> property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

Id. § 541.501(b) (emphases added).

Consistent with the foregoing provisions, longstanding DOL guidance states that the outside sales exemption should be read to cover those who "*in a practical sense,* ... are salesmen in that their *activities are of the same nature* as those of persons making sales within the meaning of section 3(k)." DOL, Wage and Hour and Public Contracts Divisions, *Report and Recommendations of the Presiding Officer* (Harold Stein) at Hearings Preliminary to Redefinition at 45 (Oct. 10, 1940) ("Stein Report") (emphasis added).

Under the "practical" approach espoused by both the Act and the regulations, pharmaceutical sales representatives fit comfortably within the outside sales exemption (as they have for decades). Indeed, pharmaceutical sales representatives are among the last of the door-to-door salespeople, and they "share many more similarities than differences with their colleagues in other sales fields." *Christopher v. Smithkline Beecham Corp.*, 635 F.3d 383, 400-01 (9th Cir. 2011). Their core job function is to persuade doctors to commit to perform the act that brings about a purchase of their employers' products. As a result, pharmaceutical sales representatives' primary duty is "making sales." *Id.*

Petitioners and the Government advance a three-part argument that pharmaceutical sales representatives now are ineligible for the outside sales exemption. *First*, they appear to assert (or, more accurately, assume) that DOL's regulations impose a rigid and narrow exemption, under which an employee must not simply "make sales," but instead must deal *directly* with a buyer and *personally* transfer title or obtain a binding commitment. *Second*, they claim that the DOL's litigation position as *amicus curiae* should be given controlling deference. *Third*, they assert that all "exemptions from [the FLSA] must be construed narrowly." Pet.Br. 11, 36; Govt.Br. 26-27.

These arguments fail at every step.

First, the text as well as the self-evident purpose of the outside sales-exemption calls for a flexible definition, under which an employee is overtime exempt if he functions in the capacity of an outside salesperson. Petitioners' and the Government's attempts to rigidly limit the exemption find no support in the text of Section 3(k) or the DOL's regulations and would undercut the purposes of the Act.

Second, where, as here, an agency's regulations at most clarify only that certain situations are *included* in the coverage of a statutory provision, but offer no guidance as to the outer limits of the statute, an agency's litigation position regarding those limits is not entitled to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). In such a situation, the rationale for applying *Auer* deference is lacking because the agency has not engaged with the public or brought its expertise to bear on the relevant question of the contours of the statute. Moreover, granting controlling deference on issues not remotely addressed during a rulemaking would perversely invite agencies to avoid clear and comprehensive regulations accompanied by notice and comment and instead adopt major policy changes *via* amicus brief.

Third, although courts routinely state that exceptions to the FLSA should be narrowly construed, that canon does withstand scrutiny as a means of assessing congressional intent. Rather, the numerous exemptions to the Act make clear that Congress sought to limit the FLSA in order to benefit employers and employees alike.

Accordingly, this Court should hold that Section 3(k) and the DOL's related regulations set out a functional and flexible definition of outside salesperson that encompasses pharmaceutical sales representatives; that the DOL's litigation position in this case is not entitled to *Auer* deference; and that the "anti-employer" narrow construction canon has no place in a proper interpretation of the FLSA.

I. A FUNCTIONAL DEFINITION OF THE OUTSIDE SALES EXEMPTION IS NECESSARY TO EFFECTUATE CONGRESSIONAL INTENT, AND PHARMACEUTICAL SALES REPRESENTATIVES FALL WITHIN THAT DEFINITION.

The text, structure, and self-evident purpose of Section 3(k) and the DOL's regulations indicate that the outside sale exemption must be defined flexibly and broadly to encompass those employees who "in some sense make a sale." Stein Report at 46. Under such an approach, the activities of a pharmaceutical sales representative fit comfortably within the outside sales exemption.

A. The Text, Structure, And Purpose Of The Outside Sales Exemption Require A Broad, Functional Approach.

Numerous factors support a functional reading of the outside sales exemption that looks to the activities and structure of an employee's position.

First, the text of the statute itself is expansive. Congress extended the exemption to "any employee employed … *in the capacity* of outside salesman." 29 U.S.C. § 213(a)(1) (emphasis added). This wording is significant since Congress could more simply have exempted "any employee employed *as* an outside salesman," yet instead chose wording that connotes a broader, functional analysis. *See* Random House Dictionary of the English Language 219 (unabridged ed. 1973) (defining "capacity" as "position; *function*; [or] relation") (emphasis added); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting the "cardinal principle of statutory construction" that the courts should "give effect, if possible, to every clause and word of a statute") (internal quotation marks omitted). Moreover, the term "sales" is defined broadly in the Act to "*include*[] any sale, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." 29 U.S.C. § 203(k) (emphasis added).

Second, the DOL's regulations do nothing to limit the breadth of the outside sales exemption. The regulations instead provide that an outside salesperson must have as their primary duty "[m]aking sales within the meaning of [29 U.S.C. § 203(k)]." 29 C.F.R. § 541.501(a). The verb "to make" simply means "to produce; cause to exist; [or] bring about." *See* Random House Dictionary of the

English Language 866 (unabridged ed. 1973). Thus, an *employee clearly falls within the* DOL's regulations if his or her primary duty is making personal calls on the decisionmakers in sales transactions in order to produce or bring about sales, or cause them to exist.

Moreover, the regulations broadly construe the term "sales":

> Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and *valuable evidences of intangible property*. Section 3(k) of the Act states that 'sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition."

Id. § 541.501(b). Thus, although the regulations specify two circumstances that might involve "sales" (transfer of "title to tangible property" and "tangible and valuable evidences of intangible property"), the regulations simply refer back to the statute as defining the limits of that term.

DOL's guidance regarding the outside sales exemption has likewise suggested a broad, functional approach: In a longstanding guidance issued in 1940, the DOL stated that the outside sales exemption should be read to cover those who "in a practical sense, ... are salesmen in that their activities are of the same nature as those of persons making sales *within the meaning of section 3(k)*." *Stein Report* at 45; *see also* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) ("Outside Sales and Computer

Employees") ("Defining and Delimiting") (recognizing that the exemption applies when employees "'*in some sense* make a sale'") (quoting Stein Report at 46) (emphasis in original)).

Third, the broad language of the statutory and regulatory text is reinforced by the self-evident purpose of the outside sales exemption. The exemption reflects the commonsense understanding that overtime pay is "incompatible with the individual character of the work of an outside salesman." *Jewel Tea Co.*, 118 F.2d at 208. Outside salespeople must work flexible hours and operate beyond the supervision of their employers. Their performance, moreover, can be assessed with an objective measure—the sales in their territory—which allows the employer to reward hard work and skill rather than simply hours at the office. And because outside sales representatives benefit from the fruits of working longer hours in the form of incentive compensation, it is less likely that long hours will reflect exploitation rather than the free pursuit of self-interest.

Paying overtime in this context would be unnecessarily burdensome and inefficient. The employer would likely have to limit the number of hours an employee could work and would face serious practical obstacles in verifying those hours. And employees, in turn, would lose the flexibility of working at their own pace and on their own schedule, and the option of earning additional compensation by putting in longer hours.

In short, the exemption does not constitute some formalistic dispensation keyed to an employee personally bringing about a transfer in title. Rather, it reflects a highly practical assessment, based on the *activities* and *employment structure* of outside salespeople, that such employees do not require the protection of (and could in fact be harmed by) overtime pay requirements.

B. Pharmaceutical Sales Representatives Perform The Activities Of An Outside Salesperson.

Pharmaceutical sales representatives work outside of an office and "spend much of their time traveling to the offices of, and working with, physicians within their assigned geographic territories." *Christopher*, 635 F.3d at 386. Specifically, they make sales calls on these physicians, the gatekeepers and decisionmakers with respect to their patients' prescription drug purchases, and it is the role of a pharmaceutical sales representative to importune and persuade the physicians to commit to select his or her employer's product for purchase in appropriate medical circumstances. *Id.* at 396 ("[I]t is patient's physician, who is vested with both a moral and legal duty to prescribe medication appropriately, who selects the medication and is the appropriate focus of our 'sell/buy' inquiry."); *see also* Cal. Bus. & Prof. Code § 4040(a)(1)-(2) defining "prescription" as "an oral, written, or electronic transmission *order* ... [i]ssued by a physician" (emphasis added)); 29 Pa. Code § 27.1 (defining "prescription" as "[a] written, electronic or oral *order* issued by a licensed medical practitioner" (emphasis added)). Pharmaceutical companies do not direct or constrain the hours their sales representatives can or should work. *Christopher*, 635 F.3d at 386-87. And pharmaceutical sales representatives generally receive "incentive-based compensation" to reward their longer hours. *Id.* at 387.

Pharmaceutical sales representatives thus perform the same core activities, and implicate the same practical considerations, as other traveling salespeople. Applying the outside sales exemption would accordingly serve the policies that animate the exemption. Namely, employers would be saved the burdens of limiting and verifying their employees' hours and would remain free to compensate their employees based on the quality of their work rather than merely hours logged.

In contrast, subjecting pharmaceutical sales representatives to FLSA's overtime requirements would be inconsistent with the purposes of the FLSA and reflect nothing more than an inefficient and unjustified windfall for the Petitioners. As the court below observed, far from being exploited, the plaintiffs in this case "instead earn salaries well above minimum wage—up to $100,000 a year." *Christopher*, 635 F.3d at 388 (internal quotation marks omitted). Indeed, the pharmaceutical sales representative position was recently chosen as one of the best American jobs. *See* Young and Restless—top 20 jobs, Money Magazine (2007) *available at* http://tinyurl.com/2nw4w9 (last visited March 14, 2012). Thus, to the extent that pharmaceutical sales representatives work long hours, they do so not "out of desperation," *Mechmet v. Four Seasons Hotels, Ltd.*, 825 F.2d 1173, 1176 (7th Cir. 1987), but rather based on an incentive to increase their compensation.

Accordingly, there is little reason to believe that requiring an hourly-compensation model would increase compensation to pharmaceutical sales representatives going forward. Rather, "either the base pay ..., or the commission rate, or both, would decline, to offset the overtime premium." *Mechmet*, 825 F.2d at 1176. Moreover, employers would likely be forced to limit the number of hours employees could work and could even *reduce* net compensation in order to account for the burdens of monitoring employee hours and the inefficiency of a position constrained from working flexible hours.

In short, application of the overtime pay requirements to pharmaceutical sales representatives would not benefit pharmaceutical sales representatives going forward; instead, Petitioners would simply receive a windfall in the form of overtime compensation over and above the "bonuses [they already received] *in lieu of overtime* as an incentive to increase their efforts." *Christopher*, 635 F.3d at 388 (internal quotation marks omitted; emphasis added).

II. THE FORMALISTIC LIMITS URGED BY PETITIONERS AND THE GOVERNMENT FIND NO SUPPORT IN THE STATUTORY OR REGULATORY TEXT AND WOULD UNDERMINE THE PURPOSE OF THE OUTSIDE SALES EXEMPTION.

Petitioners and the Government emphasize repeatedly that the DOL's regulations draw a distinction between outside sales work and promotional work, and provide that, in addition to outside sales work, promotional work that is "performed incidental to ... an employee's own outside sales work" is also exempt, 29 C.F.R. § 541.503. *See* Pet.Br. 15-28; Govt.Br. 9-18.

Petitioners and the Government then argue that, because pharmaceutical sales representatives engage in promotional work that is not incidental to their own sales, pharmaceutical sales representatives cannot be considered outside salespeople.

Yet, when it comes to establishing the critical premise of this argument—that pharmaceutical sales representatives engage in promotional work rather than making their own sales—Petitioners and the Government proceed largely by *ipse dixit*. If one reads between the lines of Petitioners' and the Government's arguments, it appears that they believe pharmaceutical sales representatives do not engage in outside sales work because they fall outside certain categorical limits on that exemption. Namely, they appear to contend that an employee can qualify as an outside salesperson only if he or she deals directly with a buyer and personally causes a transfer of title or obtains a binding commitment. Pet.Br. 27; Govt.Br. 13. Yet these limits find no support in the text of the FLSA or the DOL's regulations, and are utterly disconnected from the purposes of the outside sales exemption. *Cf. Christopher*, 635 F.3d at 396 (concluding that the Petitioners' and Government's view "ignores the reality of the nature of the work of [pharmaceutical sales representatives], as it has been carried out for decades").

A. An Outside Salesperson Need Not Deal Directly With The Buyer.

Petitioners and the Government emphasize that physicians are not the ultimate purchasers of pharmaceuticals. *See* Pet.Br. 6 ("Physicians never place an order with petitioners ...."); *Id.* at 19

("Physicians are not customers ...."); Govt.Br. 8 ("[T]he physicians with whom petitioners interacted were not the intended purchasers of the products in question."). This assertion would only be relevant, however, if an outside salespersons could not deal with the *agent* of a potential buyer. A doctor's decision to prescribe a drug is just one example of the many instances in which a fiduciary is entrusted with the task of choosing a product to be purchased by a principal. *See* Richard A. Lord, 23 Williston on Contracts § 62:12 (4th ed. 2011) ("[L]ike the attorney-client relationship, the physician-patient relationship is highly fiduciary in nature."); *see also Christopher*, 635 F.3d at 396 (noting that "[a] patient's physician ...is vested with both a moral and legal duty to prescribe medication appropriately").

Not a single word in the FLSA or the DOL's regulations, however, limit the outside sales exemption to salespeople who deal directly with the buyer. Nor is it reasonable to assume such a limit, as salespeople routinely deal with agents of potential buyers. Indeed, this practice is the overwhelming norm in sales to an organization. Limiting the outside sales exemption to those salespeople who deal only with an ultimate purchaser would thus restrict the scope of the exemption beyond any plausible conception of outside sales.

Relatedly, Petitioners and the Government maintain that Petitioners cannot be outside salespeople because they do not themselves take orders. *See* Pet.Br. 13; Govt.Br. 5. Yet, there is again no basis in the Section 3(k) or the DOL's regulations to conclude that an outside salesperson must personally fill orders. Indeed, DOL has made quite clear in its own guidance that this is *not* required. *See* DOL, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) ("Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button."). And for good reason. The fact that a door-to-door encyclopedia salesman has an assistant take an order, or directs the customer to a website where the customer can place the order directly, does not make him any less an outside salesman.

Neither Petitioners nor the Government, moreover, offers any explanation of why an employee's direct dealings with a buyer are relevant to the purposes animating the outside sales exemption. Whether an outside salesperson deals directly with a buyer, or instead with a trusted agent who in turn encourages the buyer to make the ultimate purchasing decision, and whether or not the salesperson personally takes an order, the *activities* performed by the salesperson and the resulting impracticality of an hourly-overtime arrangement are the same.

B. An Outside Salesperson Need Not Obtain Binding Commitments.

Petitioners also emphasize that pharmaceutical sales representatives do not obtain "contracts to prescribe GSK products" or other binding commitments. Pet.Br. 6. That is, an employee "makes sales," in Petitioners' view, only where "the employee actually consummate[s] the sale himself, either by entering into a contractual exchange ... or at a minimum by obtaining a commitment to purchase." Pet.Br. 17. The Government takes an even stricter view: "An employee does not make a 'sale' for purposes of the 'outside salesman' exemption unless he actually transfers title to the property at issue." Govt.Br. 12-13.

In fact, this argument is largely an attempt to repackage the untenable claim that an outside salesperson must deal directly with a buyer and personally fill orders. In other words, Petitioners and the Government appear to believe that, if the encyclopedia salesman leaves a house without transferring title, he has not made a sale when the homeowner places an order the next day with an assistant or online. Once this unsupported claim is put aside, however, it is clear that pharmaceutical sales representatives, like the encyclopedia salesman, *do* cause the purchase of pharmaceuticals; *i.e.*, the purchase by the patient when he or she fills a prescription.

To be sure, Petitioners and the Government do not believe that pharmaceutical sales representatives should be credited with causing this sale. Pet.Br. 6; Govt.Br. 13. But the reasons they offer again find no support in the text or purpose of the outside sales exemption.

For example, Petitioners and the Government note that under the outside sales exemption employees must "mak[e]" sales, and they implicitly conclude that this must mean that an outside salesperson must *personally* consummate a transaction. Pet.Br. 12; Govt.Br. 30-31. But the conclusion does not follow. As noted, *supra* at 8, "to make" simply means "to produce; cause to exist; [or]

bring about." *See* Random House Dictionary of the English Language 866 (unabridged ed. 1973). It does not remotely suggest that the employee must directly exchange product for consideration, or otherwise "personally consummate" the sale. *Cf.* Defining and Delimiting, *supra* at 22,162 (noting that "technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales"). And, as already described, such a limit on the sales exemption would be inconsistent with the common understanding of a salesperson.

Petitioners and the Government also contend that an outside salesperson must personally transfer title directly to a buyer because the regulations state that *promotional* work qualifies as overtime exempt only if it is in support of his or her *own* sales. Pet.Br. 3; Govt.Br. 14. This argument only begs the question of whether pharmaceutical sales representatives engage in sales. And, as noted, their work—directly and personally soliciting the physician/agents who act as decisionmakers in pharmaceutical sales transactions—is sales and pharmaceutical sales representatives clearly are "employed in the capacity of outside salesmen."[2]

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[2] The Government notes that, when the FLSA's regulations were amended in 2004, several commentators requested that the "distinction" between promotional work and sales work be "eliminated," and that the Chamber argued promotional activities are "an integral part of the sales process" even when they do not culminate in an "individual sale." Govt.Br. 4 (quoting Defining and Delimiting, *supra* at 22,162). But whether or not the outside salesperson exemption should be so extended has no bearing on the case before this Court. Pharmaceutical sales representatives have been properly considered overtime exempt for more than 70 years. *See*

Petitioners additionally suggest that pharmaceutical sales representatives do not make or cause pharmaceutical sales because they only provide information to doctors about their employer's products and doctors have a duty to prescribe products in the best interest of the patient. Pet.Br. 4 ("Petitioners' primary responsibility was to give physicians information provided by GSK so the physicians could use their own judgment in deciding whether to prescribe a GSK product."). It is not clear, however, why these facts are inconsistent with effective salesmanship; to the contrary, providing objective information that demonstrates how a product can benefit a buyer is a common and effective method of sales. Moreover, it is difficult to take seriously the suggestion that pharmaceutical sales representatives do not "cause" any increase in sales: Petitioners have accepted substantial bonus pay, and the industry expends billions of dollars each year, based on that very premise. *Christopher*, 635 F.3d at 387, n.4, 388, n.6.

In all events, whatever the precise point at which the Petitioners and the Government believe a salesperson can be considered to "make" sales, neither Petitioners nor the Government points to any language in the statutory or regulatory text suggesting that only those salespeople who personally obtain a binding commitment or directly consummate a transfer of title may be credited with a sale. Likewise, neither Petitioners nor the

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(continued...)

Christopher, 635 F.3d at 399. No change to the FLSA's promotion regulations—or any other regulation—is necessary for this Court to reach the same conclusion.

Government attempts to explain why the purposes of the outside sales exemption would be served by limiting the exemption to only those salespeople who personally administer a change in title.

III. BECAUSE THE DOL'S OUTSIDE SALES REGULATIONS DO NOT LIMIT THE STATUTORY TERMS, THE DOL'S LITIGATION POSITION IS NOT ENTITLED TO DEFERENCE.

Petitioners and the Government invoke *Auer v. Robbins* for the proposition that the DOL's litigation position as *amicus curiae* in this and related cases is entitled to "controlling deference." This Court has already established, however, that "[a]n agency does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Gonzales v. Oregon*, 546 U.S. 243, 256 (2006); *see also* 29 C.F.R. § 541.501(a) (providing that the exemption applies to persons who work outside their employer's premises, "[m]aking *sales* within the meaning of" 29 U.S.C. § 203(k)). This "parroting exception" to *Auer* deference should apply here, lest agencies be allowed to circumvent the notice and comment process simply by promulgating broad regulations and then implementing major policy changes *via* amicus brief.

Indeed, as explained above, the DOL's regulations do not speak to the limiting principle that Petitioners and the Government propose in this case. Petitioners and the Government emphasize that the regulations make *promotional* work non-exempt. But this is a red herring; Petitioners are responsible for making, *i.e.*, causing, *sales* of their products.

Petitioners' only other purported textual source for the principle that an outside salesperson must deal directly with the buyer and personally cause a transfer in title is the regulations' use of the word "mak[e]." Yet, that term does not remotely suggest such a limit. *See supra* at 8. To the contrary, and as noted, it suggests that the exemption applies to those, such as pharmaceutical sales representatives, who make in-person sales calls on decisionmakers in order to bring about sales of their employer's products.

Particularly against this backdrop, then, the failure of the DOL's regulations to provide any relevant specificity is dispositive. As the Court explained in *Gonzales*, *Auer* deference is based on the premise that, where regulations "g[i]ve specificity to a statutory scheme the [agency] was charged with enforcing," they bring the agency's "considerable experience and expertise" to bear on the disputed issue. 546 U.S. at 256. Where "the underlying regulation does little more than restate the terms of the statute itself," however, that premise is lacking. *Id.* at 257.

This Court's decision in *United States v. Mead Corp.*, 533 U.S. 218 (2001), moreover, makes it particularly important that the Court limit *Auer* deference to situations in which an agency has genuinely brought its experience and expertise to bear on the relevant question. Under *Mead*, an agency may receive *Chevron* deference for its interpretation of a *statute* only when it engages in the sort of procedural formalities that indicate the agency was exercising the authority "to make rules carrying the force of law." *Id.* at 226-27. Yet this limit could be easily circumvented if the agency could simply pass a regulation parroting the statute, and then invoke controlling deference under *Auer* to its interpretation of its own *regulation.*

This concern is amply illustrated here. Although the Government attempts in its *amicus* briefs to cram a novel statutory interpretation into the broad phrase "making sales," the fact remains that the DOL has not credibly brought its "considerable experience and expertise" to bear on the disputed question. *Gonzales*, 546 U.S. at 256. Giving "controlling deference" to such an interpretation would accordingly create a perverse incentive for agencies to promulgate only broad, vaguely worded regulations through notice and comment proceedings, leaving them free to implement significant policy changes under the guise of interpreting those regulations.

IV. THIS COURT SHOULD ABOLISH THE UNJUSTIFIABLE CANON THAT EXCEPTIONS TO THE FLSA MUST BE NARROWLY CONSTRUED.

"On occasion, a would-be doctrinal rule or test finds its way into [this Court's] case law through simple repetition of a phrase—however fortuitously coined." *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 531 (2005). When it becomes apparent, however, that such "repetition of a phrase" is "doctrinally untenable," this Court has properly stepped in to "correct course" and hold that the fortuitously coined, but inappropriate rule "has no proper place in [its] jurisprudence." *Id.* at 541, 544, 548 (emphasis omitted).

This case calls for just such a course correction. From time to time, this Court has stated "that remedial statutes should be liberally construed" to effectuate their remedial purpose. *SEC v. CM Joiner Leasing Corp.*, 320 U.S. 344, 353 (1943). In 1945, however, this Court went one step further by stating that, because the FLSA was "designed to extend the frontiers of social progress," purposeful, explicit exemptions to such "humanitarian and remedial legislation" should "be narrowly construed." *AH Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (internal quotation marks and citation omitted). "[T]hrough simple repetition," *Lingle*, 544 U.S. at 531, this statement has produced a well-established "anti-employer" canon in FLSA cases. *See, e.g.*, *Solis v. Washington*, 656 F.3d 1079, 1083 (9th Cir. 2011) ("FLSA exemptions are to be narrowly construed against ... employers and are to be withheld except as to persons plainly and unmistakably within their terms and spirit.") (internal quotation marks omitted).

As Justice Scalia has observed, there is no logical basis to infer that Congress means more or less than it says in a statute, simply because the legislation might be described, in some vague sense, as "remedial." *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 581-86 (1990) ("Assorted Canards"). Thus, the proposition that Congress would wish the FLSA to impose greater burdens on employers than its text, structure, and purpose indicate is itself unsupportable. Moreover, the supposed corollary—that courts should assume Congress is less than sincere when it includes *explicit exemptions* to a "remedial" statute—is doubly flawed, particularly in the context of the FLSA: The numerous exceptions to the so-called "remedial" provisions of the Act clearly demonstrate that Congress did *not* intend the Act to impose limitless burdens on employers. Moreover, the exemptions themselves promote the worker-protection purposes of the Act by allowing flexible employment arrangements that benefit employees as well as employers.

The Court should accordingly abolish the canon that exemptions to remedial statutes should be narrowly construed, at least as applied to the FLSA. The validity of that canon is squarely presented in this case, as it describes the background standard for interpreting the outside sales exemption. Moreover, it has become apparent that the canon is not simply an ill-advised, yet harmless turn of phrase; rather, lower court opinions indicate that this unsupported trope has distorted the process of interpreting the FLSA. The Court should make clear that this rule "has no proper place in [its] jurisprudence." *Lingle*, 544 U.S. at 540.

A. The Canon That Congress Intended Exemptions to the FLSA To Be Narrowly Construed Is Patently Unjustified.

The FLSA "anti-employer" canon is descended from the following statement of the Court in *AH Phillips*:

> The Fair Labor Standards Act was designed to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work. Any exemption from such humanitarian and remedial legislation must therefore be

> narrowly construed .... To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.

324 U.S. at 493 (internal quotation marks and citation omitted). This hostile view toward exemptions to "remedial" statutes, in turn, is an application of "the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

As Justice Scalia has explained, however, even this "familiar canon" suffers from serious flaws. *See Assorted Canards*, *supra* at 581-86. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). And in deciding how Congress has struck the balance, the goal "should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Scalia, *Assorted Canards*, *supra* at 582. Of course "that may often be difficult, but [there is] no reason, *a priori*, to compound the difficulty, and render it even more unlikely that the precise meaning will be discerned, by laying a judicial thumb on one or the other side of the scales." *Id.*

Stated another way, since the purpose of all statutory interpretation is to assess congressional intent, the rule of construing remedial statutes broadly reflects an assumption that Congress would have intended for some statutes to prohibit or require more than their text, structure, and purpose would otherwise indicate. Yet *all* statutes are in some sense remedial, "since one can hardly conceive of a law that is not meant to solve some problem." *Id.* at 583. And there is no reason to think that Congress is more or less timid in expressing its will through the text and structure of certain statutes, simply because those laws might be "remedial" in some narrower, undefined sense.

The corollary spawned in *AH Phillips*, however—that *exemptions* to the FLSA should be narrowly construed—only doubles down on these flaws. Even assuming that "remedial" statutes should be broadly construed, there is simply no basis to conclude that Congress intends remedial statutes to be extended *in the face of an express exemption*. In such instances, by definition, Congress has explicitly stated that it does *not* wish the statute to be extended broadly. And there is no reason to believe in the abstract that Congress in these situations does not mean what it says, or that it feels more strongly about the statute's prohibitions than its exemptions.

Indeed, one could just as easily say that *exemptions* to remedial statutes are themselves "remedial," as they are intended to remedy the otherwise excessive scope of more general provisions. Accordingly, if one took seriously the rule of liberally construing "remedial" provisions, there is at least as strong an argument that statutory exemptions should be read *broadly*. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). Of course, such complexity and confusion can be avoided entirely simply by interpreting the exemptions through the standard tools of statutory construction without handicapping one outcome over another by preordaining it more desirable.

Placing a thumb on the interpretive scale is particularly inappropriate in the context of the FLSA for two reasons. *First*, Congress included a host of exemptions to the so-called "remedial" provisions of the Act. Congress excluded from these protections over 50 categories of employees ranging from white collar workers, to fishermen and seamen, to employees of movie theaters or the maple syrup industry. *See* Brief of *Amicus Curiae* National Federation Independent Business, Appendix A. It is accordingly implausible to suggest that Congress was reluctant to carve out exceptions to the Act. In fact, many of these exemptions were enacted precisely "to countermand [broad] judicial interpretations of the FLSA." *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 957 (11th Cir. 2007). "Consequently, construing [FLSA exemptions] narrowly against employers ... contravenes not only basic tenets of statutory construction but also the readily apparent intent of the legislators who approved the [exemptions'] language." *Id.* at 958.[3]

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[3] Nor can it be argued that the anti-employer canon should be retained because Congress has failed to expressly repudiate it. "It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation." *Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n.1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cnty.*, 480 U. S. 616, 671-672 (1987) (Scalia, J., dissenting)).

Second, in many cases, the exemptions to the FLSA serve the very same employee-protective goals as the more general provisions. Congress believed that the best way to ensure "a fair day's pay" was to require overtime in *some circumstances. AH Phillips, Inc.*, 324 U.S. at 493. But, Congress likewise believed (as demonstrated by the inclusion of explicit exemptions), that alternative compensation arrangements could provide better and fairer pay in *other circumstances.* Courts should draw the line between these two sets of circumstances by interpreting the text and purpose of the exemption set out in the FLSA, not by "laying a judicial thumb on one or the other side of the scales." Scalia, *Assorted Canards, supra* at 582.

This case is illustrative. As explained above, forced overtime would saddle pharmaceutical companies as well as their sales representatives with an inefficient and unfair compensation model, under which the representatives would be limited in the hours they could work and unable to earn extra pay for greater effort and better performance. *See supra* at 11; *see also Jewel Tea Co.*, 118 F.2d at 208 ("To apply hourly standards primarily devised for an employee on a fixed hourly wage is incompatible with the individual character of the work of an outside salesman."). Accordingly, while Petitioners themselves would obtain a windfall if they prevail in this suit, *supra* at 11-12, their narrow construction of the outside sales exemption would *undermine* rather than promote the interests of employees going forward. There is no basis to assume *a priori* that Congress would wish this result absent a "plain[] and unmistakable[]" statement to the contrary, *Solis,* 656

F.3d at 1083, simply because the FLSA might be deemed, in some vague sense, "remedial."

B. The Validity Of The Canon Is Squarely Encompassed Within The Second Question Presented And This Court Should Address It.

While this Court may be capable of resolving this case without addressing the validity of the canon, that issue is squarely presented in this case and prudential considerations strongly support resolving it.

The proper standard with which to interpret the outside sales exemption is a question that is "fairly included" in the question presented of whether the outside sales exemption applies to pharmaceutical sales representatives. Sup. Ct. R. 14(1)(a). Indeed, the lower courts have repeatedly cited the anti-employer canon at the outset of their analyses of the question presented in this case. *See, e.g.*, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 150 (2d Cir. 2010); *Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459, 469 (S.D.N.Y. 2008); *Ruggeri v. Boehringer Ingelheim Pharm.*, 585 F. Supp. 2d 254, 261 (D. Conn. 2008).

Moreover, although this Court has previously endorsed the anti-employer canon, *e.g.*, *AH Phillips, Inc.*, 324 U.S. at 493, *stare decisis* presents no obstacle to rejecting it now. "[T]his Court is bound by holdings, not language." *See Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). And *amicus curiae* is not aware of any decision in which the anti-employer canon was an essential part of this Court's holding. *Cf. Lingle*, 544 U.S. at 545-46 ("We emphasize that our holding today—that the 'substantially advances' formula is not a valid takings test—does not require us to disturb any of our prior holdings. To be sure, we applied [this] inquiry in *Agins* itself .... But in no case have we found a compensable taking based on such an inquiry.").

Indeed, this Court's earlier endorsement of the anti-employer canon is one of the strongest reasons it should reject it now. Although this Court is not bound by language that is not part of its holdings, the lower courts clearly perceive themselves to be. There is strong evidence, moreover, that this perception creates real distortion of the FLSA.

As a general matter, the existence of the canon creates a risk that courts will pull up short of the careful analysis needed to decide close cases, defaulting instead to the canon as an easy tie breaker. And this effect is apparent in practice. For example, in *Alvarez v. IBP, Inc.*, 339 F.3d 894 (9th Cir. 2003), the court held that protective outfits worn by employees of a meat processing plant did not count as "clothing" for purposes of FLSA's exemption for time spent donning and doffing clothing. *Id.* at 905. The employer cited dictionary definitions defining "clothing" to include "whatever is worn as covering for the human body." *Id.* Indeed, earlier in its opinion, the court itself referred to the protective outfits (perhaps unintentionally) as "specialized protective clothing." *Id.* at 897, 905. However, the court reasoned that the term "clothing" could not be read in this "expansive fashion" because "[t]he protective gear at issue [did] not plainly and unmistakably fit within [the FLSA's] 'clothing' term." Absent such a fit, the court reasoned, the anti-employer canon "*require[d]* that [it] construe [the exemption] against the employer seeking to assert it."

Id. at 905 (emphasis added); *see also Amendola*, 558 F. Supp. 2d at 472 (distinguishing cases that were factually identical but "d[id] not acknowledge that the FLSA's exemptions must be narrowly construed against employers").

This Court should therefore take the opportunity presented in this case to abolish the canon that exemptions to remedial statutes should be narrowly construed, at least as applied to the FLSA.

CONCLUSION

For the foregoing reasons and those stated by Respondent, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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BRIEF

No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER AND
FRANK BUCHANAN,
Petitioners,

v.

SMITHKLINE BEECHAM CORP.,
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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The Equal Employment Advisory Council (EEAC) respectfully submits this brief as *amicus curiae*. The brief supports the Respondent and urges affirmance of the decision below.[1]

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership includes approximately 300 major U.S. corporations that collectively employ roughly 20 million workers. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of fair employment practices and equal employment opportunity policies.

All of EEAC's members are employers subject to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201 *et seq.*, as amended, the Department of Labor's (DOL) implementing regulations at 29 C.F.R. pt. 541, as well as other federal workplace protection and nondiscrimination laws. The fair and consistent implementation of these laws and regulations is of paramount concern to all employers, including EEAC's members. Equally important to its membership, however, is the opportunity to participate in the notice-and-comment rulemaking process mandated by the Administrative Procedure Act (APA), 5 U.S.C. § 553, when the Department of Labor, or any federal agency, seeks to modify its regulations using its Congressionally-delegated authority.

The question presented regarding what, if any, deference should be accorded to a Labor Department regulatory interpretation contained nowhere other than an *amicus curiae* brief therefore is of significant importance to EEAC. The Ninth Circuit properly held that, under the circumstances, the Secretary of

Labor's interpretation of the regulatory definition of "sale," which was expressed solely in two *amicus curiae* briefs, was not entitled to any judicial deference. Since 1976, EEAC has filed numerous *amicus curiae* briefs with this Court and the lower courts exploring similar issues.[2] Because of its experience in these matters, EEAC is well-situated to brief the Court on the importance of the issues beyond the immediate concerns of the parties to the case.

STATEMENT OF THE CASE

Petitioners Michael Christopher and Frank Buchanan were formerly employed by Respondent SmithKline Beecham Corp., d/b/a GlaxoSmithKline (GSK), as pharmaceutical sales representatives (PSRs), where they were responsible for selling GSK products to physicians. JA 170; *see also* JA 85 (PSR is "[r]esponsible for sales of assigned products in assigned territory"). Under federal law, physicians are the only individuals permitted to write prescriptions for GSK products, and thus the only people who may order GSK products. Pet. App. 2a-4a; JA 133. Christopher's employment was terminated in May of 2007, and Buchanan left the company after he accepted a PSR position at another pharmaceutical company. *See* Ninth Circuit Supplemental Excerpts of Record (SER) 94-100, 200; Pet. App. 2a.

Petitioners then filed a class action in the United States District Court for the District of Arizona, alleging that GSK had improperly classified PSRs as exempt employees under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, and seeking overtime pay for the hours they worked each week outside of normal business hours. Because federal law prohibited PSRs from directly transferring GSK products to doctors and patients, Petitioners argued they were not engaged in "sales," as that term is defined under the FLSA, and thus not covered by the FLSA's "outside salesman" exemption. Pet. App. 41a-42a.

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[2] *See, e.g.*, *Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81 (2002); *Edelman v. Lynchburg Coll.*, 535 U.S. 106 (2002); *United Space Alliance, LLC v. Solis*, 2011 U.S. Dist. LEXIS 130938 (D.D.C. Nov. 14, 2011).

The district court rejected Petitioners' argument and granted summary judgment in favor of GSK. The court held that because the FLSA and the Department of Labor (DOL) define the term "somewhat loosely," PSRs need only engage in a sale "in some sense" in order to be covered by the exemption. Pet. App. 43a-44a. In so holding, the court declined to accord deference to an uninvited *amicus curiae* brief that had been filed by the Labor Department in a completely separate litigation, *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), which at that time was pending before the Second Circuit. DOL Br. as *Amicus Curiae*, *Novartis Wage & Hour Litig.*, No. 09-4376 (Oct. 13, 2009) (Novartis Br.). In the *Novartis* brief, which Petitioner's submitted as "supplemental authority" to the district court, DOL argued that a "sale" for the purposes of the FLSA's outside sales exemption required a "consummated transaction directly involving the employee for whom the exemption is sought." Novartis Br. 11.

Following the district court's decision, Petitioners moved to amend the judgment, arguing that the court failed to grant "controlling deference" under *Auer v. Robbins*, 519 U.S. 452 (1997), to the DOL's *amicus* *curiae* brief in *Novartis*. Pet. App. 49a. The court denied the motion, rejecting DOL's position as "absurd" and defying "common sense," holding that PSRs "make sales the way that sales are made in the pharmaceutical industry." Pet. App. 51a-52a.

Petitioners appealed to the U.S. Court of Appeals for the Ninth Circuit. There, DOL filed a second *amicus curiae* brief, again uninvited, that largely tracked the brief it filed in the *Novartis* litigation. In concluding that PSRs were covered by the outside sales exemption, the Ninth Circuit held that, rather than using its expertise to clarify the definition of "sales," in crafting its regulations, DOL did "'little more than restate the terms of the statute itself,'" and as such, the DOL's novel interpretation of "sales" in its *amicus curiae* brief was not entitled to any deference. Pet. App. 23a (quoting *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006)). To hold otherwise, the court reasoned, would "sanction bypassing of the Administrative Procedures Act and notice-and-comment rulemaking." Pet. App. 24a. The Ninth Circuit denied Petitioners' request for rehearing *en banc*. Pet. App. 53a. This Court granted Petition for a Writ of Certiorari on Nov. 28, 2011.

SUMMARY OF ARGUMENT

In *Auer v. Robbins*, 519 U.S. 452 (1997), this Court granted "controlling" deference to the Secretary's interpretation—expressed through an *amicus* brief—of the DOL's regulatory "salary basis" test, because it was not "plainly erroneous or inconsistent with the regulation" and there was "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment . . . ." *Auer*, 519 U.S. at 461-62. The Secretary's interpretation in the present case of what is and is not a "sale" under the FLSA, expressed solely through uninvited *amicus curiae* briefs, does not satisfy the *Auer* standard and therefore is not entitled to judicial deference.

The Secretary's interpretation of "sale," first expressed as *amicus curiae* in *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), is erroneous and inconsistent with the FLSA and DOL's implementing regulations at 29 C.F.R. pt. 541, and is a *post hoc* rationalization that "does not reflect the agency's fair and considered judgment . . ." on the definition of "making sales." *Auer*, 519 U.S. at 461-62. The Secretary's current practice of actively participating as *amicus curiae* in wage and hour litigation around the country solely to advance the department's own novel and unchecked interpretations of the FLSA is a far cry from the narrow circumstances that led the Court to granting deference in *Auer*.[3]

Were the Court to extend *Auer* deference to the Secretary's *amicus* brief under these circumstances, it would result in a judicially-sanctioned end-run around the APA-mandated notice-and-comment rulemaking process, depriving the public of the opportunity to provide invaluable input on how "sales" are conducted in various industries throughout the country. *See* 5 U.S.C. § 553.

Complex laws and regulatory schemes such as those found under the FLSA present numerous challenges for employers. From the employer's perspective, it is imperative that companies be able to rely upon the text of the regulations, without fear that with every change in administration, an agency will seek to effectuate a change in enforcement policy simply by inserting itself into a litigation as *amicus curiae*.

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[3] U.S. Dep't of Labor, Ofc. of the Solicitor, *Overtime Security Amicus Program, available at* http://www.dol.gov/sol/541amicus.htm (last visited Mar. 22, 2012).

ARGUMENT

I. THE LABOR DEPARTMENT'S NEW INTERPRETATION OF ITS OWN "OUTSIDE SALES" REGULATION, COMMUNICATED SOLELY THROUGH POLICY ARGUMENTS RAISED IN TWO UNINVITED FEDERAL APPEALS COURT *AMICUS CURIAE* BRIEFS, IS NOT ENTITLED TO JUDICIAL DEFERENCE

The Secretary's new interpretation of a "sale" under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, which has been expressed solely through *amicus curiae* briefs filed in the proceedings below and in *In re Novartis Wage & Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), is not entitled to any deference, much less controlling deference under this Court's decision in *Auer v. Robbins*, 519 U.S. 452 (1997). It is inconsistent with the plain text of the FLSA and DOL's existing regulations, and has been formulated solely for purposes of advancing through litigation an interpretation that she was either unable or unwilling to achieve through the Department's Congressionally-delegated rulemaking authority.

Auer addresses the circumstances under which a federal agency's interpretation of its own, ambiguous regulation, expressed solely in an *amicus curiae* brief, is entitled to judicial deference. There, the Court invited the Secretary of Labor to file an *amicus curiae* brief regarding the application of the Labor

Department's "salary basis" test, a regulatory mechanism created by the DOL to determine whether an employee is "exempt" from the FLSA's minimum wage and overtime requirements. *Auer*, 519 U.S. at 461.

In according "controlling" deference to the Secretary's *amicus* arguments, the Court held that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless 'plainly erroneous or inconsistent with the regulation.'" *Id.* (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). In reaching its decision, the Court also found persuasive the fact that there was "simply no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462. Judged against that standard, the Secretary's *amicus curiae* briefs in the proceedings below and before this Court fall short of the mark.

A. The Labor Department's Interpretation Of "Sales," As Expressed In Its *Amicus Curiae* Briefs, Is Plainly Erroneous And Inconsistent With The FLSA And Existing Regulations

The Secretary's current policy interpretation, that "[a]n employee does not make a 'sale' for purposes of the 'outside salesman' exemption *unless he actually transfers title* to the property at issue," is inherently inconsistent with the broad, open-ended definition of "sale" found in the FLSA and DOL's existing regulations. Brief for the United States as *Amicus Curiae* Supporting Petitioners (U.S. Br.), 12-13 (emphasis added). Moreover, it directly contradicts the Secretary's previous statements that under the FLSA, a sale must have been completed only "in some sense." 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004).

In *Auer*, the dispute centered on a provision of the "salary basis" test, which the Secretary created in DOL's regulations. Here, at issue is the definition of "making sales" for purposes of the "outside sales" administrative exemption, an element DOL has failed to define with any adequacy. The FLSA states that "sale" or "sell" *includes* any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*." 29 U.S.C. § 203(k) (emphasis added). Congress did not expound on the meaning of "other disposition," however.

The FLSA delegates to the Secretary the authority and responsibility to define what it means to be employed in the "capacity of outside salesmen," as that term is used in the FLSA. *Id.* at § 213(a)(1). The Secretary has exercised that authority in a "[g]eneral rule for outside sales employees", which defines an outside salesman as one:

> (1) Whose primary duty is:
>
> (i) making sales within the meaning of section 3(k) of the Act, or
>
> (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
>
> (2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

29 C.F.R. § 541.500(a).

DOL has further defined "[s]ales within the meaning of section 3(k) of the Act" to:

> *[I]nclude* the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" *includes* any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*.

29 C.F.R. § 541.501(b) (emphasis added).

In sum, DOL has relied on more than 70 years of expertise in this area to define "sales" simply as including a transfer of title of tangible and intangible property. As this Court has made clear, however, an agency's interpretation of its own, ambiguous rules is not entitled to deference where the construction in question does little more than restate or "parrot" the language from the statute. *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). In *Gonzales*, the Court declined to extend *Auer* deference to the Secretary's interpretation of a regulation, where the regulation simply "repeat[ed] two statutory phrases and attempt[ed] to summarize the others." *Id.* at 257. Just as in *Gonzales*, the DOL here is not entitled to "special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.* Because DOL has done little more than "parrot" Congress's own words in crafting its definition of "making sales," under *Gonzales* the novel interpretation of that definition set forth in the Secretary's *amicus curiae* brief is not entitled to *Auer* deference.

The position staked out by the Secretary in her *amicus curiae* brief purports to answer the question of what constitutes a "sale" under the FLSA by stating, "[a]n employee does not make a "sale" for purposes of the "outside salesman" exemption *unless he actually transfers title* to the property at issue." U.S. Br. at 12-13 (emphasis added). The Secretary's drastic change in position, from "*including*" a transfer in title to *requiring* one finds no support in the FLSA or DOL's regulations. Had the Secretary sought to promulgate such a narrow rule, she certainly could have crafted language to accomplish that goal when the rule was last revised in 2004. 69 Fed. Reg. 22,122 (2004). Having failed to do so, the Secretary cannot now circumvent the APA-mandated notice-and-comment rulemaking process to achieve her goals.

B. The Labor Department's Interpretation Of "Sales," As Expressed In Its *Amicus Curiae* Briefs, Is A *Post Hoc* Rationalization And Does Not Reflect The Fair And Considered Judgment Of The Department Of Labor

In *Auer*, the Court made clear that the deference afforded to the Secretary's *amicus* brief was appropriate under the circumstances, because the Secretary's position could in no way be considered a "*post hoc* rationalization." *Auer*, 519 U.S. at 462 (citation omitted). There, the Court expressly *invited* the Secretary to file an *amicus* brief regarding the DOL-created "salary-basis" test. *Id.* at 461. Here, not only were the DOL's views not solicited by this or any other Court, but they do not purport to represent any cogent interpretation of existing law or regulation. While the Court's precedent does not suggest *either* of these factors alone is a prerequisite to *Auer* deference, we respectfully submit that collectively, these differences belie any argument that the Secretary's *amicus* brief represents "fair and considered judgment" of the Labor Department. *Id.* at 462.

In both *Novartis* and in the proceedings below, the DOL inserted itself into each appeal as *amicus curiae*, advancing for the first time an incredibly narrow definition of what is and is not a "sale" under the FLSA. While the Court has not limited *Auer* deference to the views of an agency as expressed in an "invitation" brief, the Department's "uninvited" views below, coupled with its active and aggressive national *amicus* program, cast significant doubt on its motives. *See, e.g., Auer*, 519 U.S. at 461-62 (*amicus* brief filed at Court's invitation); *Chase Bank USA v. McCoy*, 131 S. Ct. 871, 880-82 (2011) (Court extended *Auer* deference to the Federal Reserve Board position in *amicus* brief, which was filed at the Court's invitation); *Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2259-60 (2011) (*Auer* deference extended to Federal Communications Commission's position in *amicus* brief filed at the invitation of the U.S. Court of Appeals for the Sixth Circuit).

The *Auer* Court also found persuasive the fact that the salary basis test was *created* by the DOL in the FLSA's implementing regulations. The Court held that "*[b]ecause* the salary-basis test is a creature of the Secretary's own regulations, his interpretation of it is, under our jurisprudence, controlling unless plainly erroneous or inconsistent with the regulation." *Auer*, 519 U.S. at 461 (citation omitted) (emphasis added). Indeed, while the FLSA is entirely silent with respect to a "salary basis" test, it explicitly defines the terms "sale" and "sell," 29 U.S.C. § 203(k), and in 70 years, the DOL has done little to elaborate on that definition. The Secretary's attempt now to define what is and is not a "sale" under the FLSA, solely for the purpose of this litigation, should not be given deference.

II. ACCORDING DEFERENCE TO THE LABOR DEPARTMENT'S RADICALLY NEW POLICY INTERPRETATION OF A WELL-SETTLED REGULATION WOULD PERMIT THE AGENCY TO CIRCUMVENT THE ADMINISTRATIVE PROCEDURE ACT, THUS DEPRIVING STAKEHOLDERS OF IMPORTANT DUE PROCESS PROTECTIONS

Auer deference under any circumstance presents significant challenges for both employers and the courts, but an extension of such deference under the circumstances present here would irreparably damage the rulemaking process upon which both agencies and employers rely. An expansion of the *Auer* doctrine would permit agencies to alter significantly employers' compliance obligations simply by announcing a change in enforcement philosophy through an *amicus curiae* brief filed with any one of the nation's more than 100 federal judicial district and circuit courts. For employers, sanctioning such conduct would discourage agency transparency and encourage abuse. In addition to providing no meaningful opportunity for comment, *Auer* deference also deprives employers of advance notice of an agency's change in position, thus denying companies the due process protections afforded by the APA.

Extending *Auer* deference to the Secretary's *amicus curiae* brief would result in a judicially-sanctioned end-run around the APA-mandated notice-and-comment rulemaking process. This Court instructs that *Auer* deference is appropriate so long as the Secretary's position does not create an "unfair surprise," or "*de facto* a new regulation." *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170-71 (2007) (*Auer* deference was appropriate because a change in the Labor Department's interpretation did not create an "unfair surprise," where the notice-and-comment rulemaking had interceded the DOL's change in interpretation and the agency's opinion was first expressed in a Department memorandum); *Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (*Auer* deference was not appropriate where the Secretary's opinion reflected an FLSA prohibition that did not exist in the text of the law or DOL regulations, and would have created "*de facto* a new regulation").

Were the Court to extend deference to the Secretary's newfound belief that there can be no sale "unless" there is a transfer of title, it would create both an "unfair surprise" to employers and "*de facto* a new regulation" by which employers must abide. The DOL, of course, could exercise its Congressionally-delegated authority to engage the public in the APA-mandated notice-and-comment rulemaking process to explore the DOL's narrow interpretation of the FLSA. When DOL last undertook that exercise, however, it concluded simply that the employee must make a sale "in some sense." 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004). If there is to be a change in that rule, one that would potentially affect millions of sales workers in the United States, the APA mandates that the public be given the opportunity to be heard. 5 U.S.C. § 553.

In its 2004 final rule, the DOL stated that it received "few comments" on the DOL's "making sales" definition. 69 Fed. Reg. at 22,161. As evidenced by the litigation in this area over the last two years, had the public known in advance of DOL's intention to adopt such a strict, narrow interpretation of "making sales," it is fair to say that there would have been a significant volume of commentary on this issue. Because the DOL has circumvented the APA in reaching its current interpretation of "sale," the Court should disregard the views expressed in its *amicus curiae* brief altogether. *See Auer*, 519 U.S. at 459 ("A court may certainly be asked by parties in respondents' position to disregard an agency regulation that is contrary to the substantive requirements of the law, or one that appears on the public record to have been issued in violation of procedural prerequisites, such as the "notice and comment" requirements of the APA, 5 U.S.C. § 553").

Further, according *Auer* deference under the circumstances would encourage the DOL and other federal agencies to act as regulatory "watchdogs," appearing as *amicus curiae* in cases solely to advance their novel interpretation of inherently and intentionally ambiguous regulations, without the consideration or benefit of public notice and comment. Shortly after being confirmed, the Solicitor of Labor announced her intention to "reinvigorate" the Department's *amicus* program, through which "interested parties" could inform the DOL of private cases involving potential violations of DOL's regulations. U.S. Dep't of Labor, Ofc. of the Solicitor, *Overtime Security Amicus Program.*[4] After reviewing these cases, the DOL then decides which cases are "appropriate" to "share with courts the Department's view of the proper application" of DOL regulations. *Id.*

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[4] *Available at* http://www.dol.gov/sol/541amicus.htm (last visited Mar. 22, 2012).

Auer cannot reasonably be read as endorsing a system by which federal agencies actively monitor court dockets for potential cases, and then simply insert themselves into the litigation as *amicus curiae*, knowing the opinions stated in the brief will be given the full force of the law so long as they are not "plainly erroneous or inconsistent" with existing regulations. The Secretary essentially concedes as much here, stating that "[u]ntil the recent set of private actions brought by employees, the Department had not addressed the applicability of the "outside salesman" exemption to PSRs." U.S. Br. at 34.

The DOL, of course, is entitled to express its opinion through *amicus* briefs. Those opinions, however, cannot and should not be given "controlling" deference merely because they are not "plainly erroneous or inconsistent." Having no incentive to modify an ambiguous regulation through appropriate notice and comment procedures, there is absolutely nothing to stop the next administration from reversing course in a future *amicus* brief. We urge this Court to end the vicious cycle before it begins.

Finally, an extension of *Auer* under these circumstances would encourage federal agencies to draft ambiguous rules during the notice and comment period, while at the same time discouraging them from correcting existing, ambiguous rules. Both outcomes present damaging implications for notice-and-comment rulemaking and would allow policy changes through an *amicus* brief that the Secretary otherwise was unwilling or unable to advance through notice and comment rulemaking.

While it may seem intuitive to defer, at least in some sense, to an agency's interpretation of its regulations, granting "controlling" deference to regulatory interpretations expressed solely through an *amicus curiae* brief tramples on the "fundamental principles of separation of powers," leaving the agency—or, more properly, the agency's drafting attorney—with both legislative and executive powers. *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Moreover, unlike the *Chevron* deference afforded to an agency's regulatory interpretations of vague statutes, which *discourages* Congress from enacting vague statutes in the first place, the *Auer* doctrine "*encourages* the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Id.* (emphasis added). Nothing demonstrates that principle more clearly than the current case.

CONCLUSION

Accordingly, the *amicus curiae* Equal Employment Advisory Council respectfully requests that the decision of the United States Court of Appeals for the Ninth Circuit be affirmed.

Respectfully submitted,

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AMICUS
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BRIEF

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IN THE
Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER AND
FRANK BUCHANAN,
Petitioners,
v.
SMITHKLINE BEECHAM CORP.,
D/B/A GLAXOSMITHKLINE,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF MEDICAL PROFESSIONALS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether pharmaceutical sales representatives (PSRs) are "outside salesmen," as defined in the Fair Labor Standards Act.

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INTEREST OF *AMICI CURIAE*[1]

Medical professionals submit the following brief to put forth the argument that, whether drug manufacturers consider PSRs salesmen or not, doctors simply cannot be "buyers."

Physicians and doctors have a vested interest in ensuring that the law properly recognizes the relationship between PSRs, doctors, and their patients. Although PSRs seek to increase sales of their products, professional ethics and norms, as well as the necessary complexities of prescribing the right drugs for the right patients, demand that physicians use their best professional judgment when making a prescribing decision. The Department of Labor properly labeled the relationship as informational and educational, despite the undeniable bias of PSRs, but several courts, including the one below, have not reached the same conclusion.

Detailed information about amici is included in the Appendix.

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[1] No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to fund its preparation or submission. Both parties were given timely notice of intent to file it. Petitioners have provided written consent to the filing of all *amicus* briefs and Respondent has provided written consent to the filing of this brief, both on file with the clerk.

SUMMARY OF THE ARGUMENT

There is no doubt that PSRs meet with physicians to further an agenda. However, the court below still was mistaken when it applied the Fair Labor Standards Act's relatively narrow "outside salesman" definition to the relationship between doctors and PSRs. While some courts have viewed those persuading intermediaries as salesmen, the court below ignores the complexities and intricacies of the doctor-patient relationship. That relationship is, at a bare minimum, much more complex than, for example, the one between someone selling car parts and someone with a car.

Physicians are bound by legal and ethical commandments when they prescribe medication to their patients. Those rigorous standards ensure that patients receive the safest, most effective, and timeliest care available. The public, therefore, is best served by doctors acting independently when making the prescribing decision.

Two principal forces make the prescribing decision unique among professional-client relationships. First, the prescribing decision requires a number of sophisticated, independent judgment calls that are left to the discretion of each individual physician. Second, physicians must adhere to ethical principles that require focusing only on the best interests of the patient when prescribing pharmaceuticals.

Therefore, the decision of the court of appeals should be reversed.

ARGUMENT

I. The decision to prescribe a drug incorporates a number of principal and controlling factors that leave little room for input from PSRs.

Modern medical literature makes it clear that physicians consider a wide variety of factors when deciding which drugs to prescribe for a patient. The complexity of the prescribing process, in combination with a doctor's obligation to tailor a drug regimen to the needs of an individual patient, renders the role of PSRs in influencing prescription decisions *de minimis.*

The foremost controlling factor in any prescribing decision is the individual needs of the patient. In addition, physicians glean much of the formative information for these individualized decisions from academic sources, their colleagues, local customs, and lists of recommended drugs. These primary decision-making factors functionally supplant the lower court's view of the PSR as a heavy-handed "salesman."

A. The prescribing decision is tightly controlled by the nature of the drug in consideration and the individual circumstances of the patient.

When prescribing a drug regimen for a patient, a doctor has two main concerns: how effective a drug will be to treat that patient's condition, and how safe the drug is to take. There are only a limited number of drugs available to treat any given condition, and a physician must weigh a given drug's safety, efficacy, and method of delivery against the other drugs in its class before deciding that it is right for a patient. Much of the information a doctor relies upon comes from sources other than PSRs. However, PSRs can sometimes still be useful, provided the information they give is viewed cautiously.

The first thing doctors consider when prescribing a drug regimen is the regimen's likely benefits to a patient compared against its potential costs. *See* Christina Ljungberg et al., *Hospital Doctors' Views of Factors Influencing Their Prescribing*, 13 J. Evaluation in Clinical Prac. 765, 767 (2007); Petra Denig et al., *Scope and Nature of Prescribing Decisions Made by General Practitioners*, 11 Quality and Safety in Health Care 137, 142 (2002). Physicians balance the safety and efficacy attributes of potential drugs against each patient's variables. Ljungberg, *supra*, at 767. Doctors consider potential risks to the patient, including "drug-drug interactions, contraindications, allergies, and substance abuse." *Id.* Physicians also consider a patient's ability to take a drug, including whether that patient is likely see a drug regimen through to the end. *Id.* Individual patient needs, not a PSR's touting of his product's benefits, are the determining factor for whether a drug gets prescribed.

B. Physicians derive much of the information they need from academic sources, colleagues, and guidelines and regulations.

When deciding whether to prescribe a drug, physicians also tend to rely heavily on their personal experience with a specific treatment option. *See* Denig, *supra* at 142. Doctors develop this experience in a number of ways, including through prescribing drugs as part of a clinical trial or during the ordinary course of practice. *See* Denig, *supra* at 141-42.

In the absence of personal experience with a drug, physicians turn to academic sources and clinical trials. *See* Puneet Manchanda, *Pharmaceutical Innovation and Cost: An American Dilemma: The Effects and Role of Direct-to-Physician Marketing in the Pharmaceutical Industry: An Integrative Review*, 5 Yale J. Health Pol'y L. & Ethics 785, 796 (2005); *see also* Jerry Avorn et al., *Scientific Versus Commercial Sources of Influence on the Prescribing Behavior of Physicians*, Med., Sci., and Soc'y, July 1982, at 5-6. These, not information from PSRs, are the most popular and influential vehicle for disseminating information to physicians. Avorn, *supra*, at 5-6. In studies, academic sources were not only frequently cited as among the most persuasive sources of information, but are also nearly always cited among the most trusted sources of information. *See, e.g.*, *id.*

Physicians also tend to rely heavily on the drugs and therapies frequently prescribed by their colleagues. Ljungberg, *supra*, at 767; cf. Giovanni Fattore et al., *Social Network Analysis in Primary Care: The Impact of Interactions on Prescribing Behavior*, 92 Health Pol'y 141 (2009). In some cases, physicians have even described coordinating with their colleagues to develop individual specialties, allowing each to stay up-to-date on literature in an effort to become the local expert on a specific matter. Ljungberg, *supra*, at 767.

Finally, physicians frequently receive information about guidelines and regulations provided by local, regional, and national organizations. *Id.* at 767-68; Glen T. Schumock et al., *Factors that Influence Prescribing Decisions*, 38 Pharmacoeconomics 557, 558-59 (2004). Many organizations publish frequently-updated lists of recommended drugs (LRDs) that provide specialized review of drugs in a field of practice and make recommendations for different scenarios. *See* Ljungberg, *supra*, at 768. Large organizations such as the World Health Organization publish LRDs for emerging diseases in remote areas or based upon nuanced patient characteristics. *See e.g.*, *WHO Model Lists of Essential Medicines*, World Health Organization, Mar., 2011, *available at* http://www.who.int/medicines/publications/essentialmedicines/. Despite the wealth of information available to physicians in any type of practice, LRDs remain a valuable source of information because of their highly specialized nature and because they tend to incorporate the most up-to-date treatments available. Ljungberg, *supra*, at 767.

Because of the wealth of credible, up-to-date information available to physicians, PSRs have only a minimal effect on the prescribing decision.

C. Physicians utilize PSRs merely for supplemental information, thereby limiting external influence on decisionmaking.

Although PSRs are a stable presence in the medical world, their influence on the prescribing processes of most doctors is overstated. In fact, some doctors refuse to see PSRs for lack of time or benefit.

Cf. Manchanda, *supra* at 788-90. However, PSRs retain an audience with many physicians for one main reason: free information. PSRs find utility in doctors' eyes by providing ongoing education about emerging therapeutic approaches. Michael Heesters, *An Assault on the Business of Pharmaceutical Data Mining*, 11 U. Pa. J. Bus. L. 789, 820 (2009). Furthermore, accumulating studies show that doctors have become adept at extracting only the information they find relevant from PSRs. Manchanda, *supra*, at 5. Even pharmaceutical companies, including GlaxoSmithKline, have acknowledged this reality by compensating PSRs not by the number of prescriptions written in a territory, but by the positive reviews of the doctors they visit. Jonathan D. Rockoff *Drug Reps Soften Their Sales Pitches*, Wall Street Journal, (Jan. 10, 2012), http://online.wsj.com/article/SB100014240529 70204331304577142763014776148.html. These indicators suggest any value of PSRs to doctors is found in PSRs' information dispensing capacity, not as "salesmen."

II. Physicians' prescribing decisions are governed by ethical considerations, the nature of which prohibits doctors from becoming mere buyers in a drug sales transaction.

In addition to the practical and legal prohibitions, ethical norms within the medical profession prevent physicians from acting as consumers or "buyers" when interacting with PSRs.

The court below unpersuasively equates PSRs with "salespeople in other fields." *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 400 (9th Cir. 2011). In making that comparison, the court below relies heavily upon *Jewel Tea v. Williams*, 118 F.2d 202 (10th Cir. 1941), a case upholding the status of tea peddlers as outside salespeople within the meaning of the FLSA. The door-to-door tea salesmen in *Jewel Tea* and the PSRs in the present case certainly share a set of similarities—both cover specific geographic areas, closely monitor a small market, and seek to eventually improve the sales of their employers—but the court below misses at least one vital difference: that doctors filter their prescription preferences through layers of professional competency.

Physicians must first and foremost be concerned with the health and wellbeing of their patients. While they should consider the relative costs of drugs in the context of understanding a patient's needs and insurance coverage, they do not make prescribing decisions based primarily upon personal financial interests.

A. Physicians are ethically barred from interacting with PSRs as though they were buyers in a sales transaction because medicine is a practice, not a business.

Medical ethics mandates that doctors approach their profession as a practice, not a business. A doctor's first responsibility is to her patients, not her balance sheet. *See, e.g.*, American College of Physicians, *Charter on Medical Professionalism*

(2002); Howard Brody, *Hooked: Ethics, the Medical Profession and the Pharmaceutical Industry* 24 (2007). Nor is a physician free to create her own body of rules. Rather, physicians are expected to abide by a code of ethics recognized by the larger medical profession.

Physicians, therefore, cannot allow themselves to be swayed or enticed by sales pitches for medical products or drugs presented to them by PSRs. Maintaining physicians' ethical integrity is important because of the power gap that exists between patients and physicians, the importance of the trust society places in physicians to make ethical decisions, and the necessity of avoiding conflicts of interest.

1. *Maintaining physicians' ethical integrity is crucial to protecting patients.*

It is crucial that physicians consider only the needs of their patient when making any decision about prescribing drugs. According the American College of Physicians, ethical practice "demands placing the interests of patients above those of the physician, setting and maintaining standards of competence and integrity, and providing expert advice to society on matters of health." *Charter on Medical Professionalism*, *supra*. Physicians must therefore be resistant to drug marketing schemes, and focus solely on the educational value of their interactions with PSRs. While they may learn from PSRs about how a particular drug functions, and ask questions about the drug, they should only focus on the drug's benefits in relation to their patients' needs. *See* W.R. Sexson & Deborah Cruze, *Ethical Issues in Child Pyschiatry*, Am. Academy of Child &

Adolescent Psychiatry News (December 2005). Focusing primarily on other factors, such as pricing or promotional deals, which would be attendant to a normal sales transaction, is therefore inappropriate to physician's ethical responsibilities. This is markedly different from a transaction selling tea. *Cf. Jewel Tea*, 118 F.2d at 203-06 (describing tea sales transactions).

This duty doctors have to their patients derives in part from the "power gap" that exists between patients and doctors. *See* Brody, *supra* at 39. A doctor simply has more medical skills, knowledge, prestige, and understanding of a patient's medical condition than do most patients, and so the patient becomes dependent on the physician, leading to the need for strong ethical guidelines. *See id.* Some scholars have even called for this duty to be legally described as a fiduciary duty. *See, e.g.,* Thomas Hafemeister & Sarah P. Bryan, *Beware those Bearing Gifts: Physicians Fiduciary Duty to Avoid Pharmaceutical Marketing*, 57 U. Kansas L. Rev. 491, 492 (2009). The American Medical Association views ethical duties to the patient as so important that in situations where ethics and the law conflict, its ethical code demands that "ethical responsibilities should supersede legal obligations." American Medical Association, *Code of Ethics*, Opinion 1.01.

The need for such strong ethics is clear: while in a doctor's care, a patient is often vulnerable; he or she may be physically, emotionally, or psychologically dependent on the doctor's decisionmaking. Brody, *supra* at 25; *see e.g.* Susan Dorr Goold & Mack Lipkin, Jr., *The Doctor Patient Relationship: Challenges, Opportunities, and Strategies*, 14 J. Gen.

Intern. Med 26, 27 (1999). Drug prescriptions are a prime example of this kind of vulnerability and dependency. In prescribing a drug, a physician is telling the patient to ingest or apply to his or her body a chemical, possibly with uncomfortable or even dangerous side effects. The patient accepts this recommendation in the belief that the doctor would not proscribe this medication untless that chemical were effective at treating whatever ailment she is suffering and that that chemical is statistically and relatively safe for her to use.

In agreeing to take that prescription, a patient plainly submit to the best judgment of his or her physician. It is the doctor who has the knowledge and the skill to choose the drug, tailored to the needs of the patient, and it is the patient who must trust the recommendations of her physician. The doctor therefore must ensure that she makes decisions about prescribing drugs solely with the needs or best interests of her patients in mind. The American Medical Association Code of Ethics mandates that "[p]hysicians should prescribe drugs, devices, and other treatments based solely upon medical considerations and patient need and reasonable expectations of the effectiveness of the drug, device or other treatment for the particular patient." AMA Code, *supra*, Opinion 8.06. Because patient need must drive every prescribing decision, ethically, a doctor must treat any presentation shared by a PSR as incidental to her own independent judgment and research.

2. *It is vital that society be able to trust physicians' ability to employ scientific knowledge and skill in their decisionmaking.*

It is vital to society that patients be able trust doctors. *See* Institute of Medicine (IOM), *Conflict of Interest in Medical Research, Education, and* Practice 2 (April 2009). People cannot choose when and under what circumstances they may get sick, so they need to know that any physician treating them has the knowledge, skill, and ethical foundation to treat them in an effective and appropriate manner. Brody, *supra* at 25. Physicians "have a duty to uphold scientific standards, to promote research, and to create new knowledge and ensure its appropriate use." *Charter on Medical Professionalism, supra.* The more the public perceives that physicians are easily swayed by sales pitches from the pharmaceutical industry, the more likely it is that social trust in physicians will erode. IOM, *supra* at 2; *See also* Brody, *supra*, at 24.

Society's trust in the medical profession is grounded, in part, in the expectation that physicians will research and analyze the different procedures, treatments, and drugs they prescribe to patients. *See* David Mechanic & Mark Schlesinger, *The Impact of Patient Care on Patients' Trust in Medical Care and their Physicians* 275 J. Am. Medical. Ass'n 1693, 1693 (1996). Educational presentations by industry PSRs are not a substitute a doctor's ethical obligation to be fully informed about the drugs she is prescribing, nor may physicians treat them as such. Physicians must commit themselves to developing the quality of their care, which "entails not only maintaining clinical competence but also working collaboratively with other professionals to reduce medical error, increase patient safety, minimize overuse of health care resources, and optimize the outcomes of care." *Charter on Medical Professionalism, supra*. As potentially useful education tools, presentations put on by PSRs are not mere "sales transactions."

3. *Physicians may not ethically treat meetings with PSRs as sales transaction because doing so would create a conflict of interest.*

The ethical duty owed by physicians to their patients must not be compromised by conflicts of interest. A conflict of interest can arise if a physician begins to feel responsible, whether through financial inducements, gifts, or otherwise, for helping a PSR boost his sales numbers. *See* Brody *supra*, at 29. Moreover, any situation that even has the potential to create a conflict of interest is unethical. *Id.* Therefore if doctors were to casually think of themselves as "buyers" or of PSRs as "salesmen," it would start to erode the ethical protections meant to avoid just such a conflict of interest.

A study published in the Journal of the American Medical Association in 2006 highlights the concern in the medical profession over the conflicts of interests pose by PSRs in doctors' offices. According it its authors, "[c]onflicts of interest between physicians' commitment to patient care and the desire of pharmaceutical companies and their representatives to sell their products," combined with strong market influences, are "posing extraordinary challenges to the principles of medical professionalism." Troyen A. Brennan et al., *Health Industry Practices that Create*

Conflicts of Interest: A Policy Proposal for Academic Medical Centers, 295 J. Am. Med. Ass'n 429, 429 (2006). To have PSRs recognized as "selling" to doctors could only further those challenges.

As a prophylactic measure to deter PSR influence, the American Medical Association has stated that ethically "[p]hysicians may not accept any kind of payment or compensation from a drug company or device manufacturer for prescribing its products. Furthermore, physicians should not be influenced in the prescribing of drugs, devices, or appliances by a direct or indirect financial interest in a firm or other supplier." AMA *Code*, *supra*, Opinion 8.06(2). Physicians committed to professionalism and ethics will therefore keep their decisionmaking regarding drug prescription patient focused. They will use PSR meetings only as an opportunity to learn more about the characteristics of particular drugs, and should not be swayed by consumer-oriented marketing pitches.

B. The medical profession has been pushing back against a sales transaction model of physicians' interactions with PSRs.

The medical profession clearly recognizes the potential hazard presented by PSRs, and it has taken several steps towards reducing the effect of sales representatives and to eliminate even the appearance of impropriety. The most significant changes include new ethical standards imposed by individual hospitals, regulations agreed to by pharmaceutical companies, legal requirements to increase transparency, and the growth of a culture of professional independence.

In spite of the ethical bars against prescription drug "sales transactions" in physicians' offices, there has been a great deal of literature detailing the medical profession's concern that interactions with PSRs have undue influence on doctors' medical judgment. Studies have shown that even the giving of small trinkets, such as notepads and coffee mugs with company logos, by PSRs can influence physician's prescribing patterns. *See, e.g*, Katz et al., *All Gifts Large and Small*, University of Pennsylvania Center for Bioethics Papers (2003); *cf.* C. Seth Landefeld & Michael Steinman, *The Neurontin Legacy – Marketing Through Misinformation and Manipulation*, 360 New Eng. J. of Med. 103, 109 (2009). That such practices occur in the relationship between the pharmaceutical industry and physicians cannot be denied. However, it does not follow that unethical marketing practices are accepted by the profession as a whole, or that these practices should be encouraged by courts' legal recognition of PSRs as "salesmen."

Efforts within the medical community to counter the image of doctors as ready and willing buyers in supposed sales transactions with PSRs have been high profile. For example, the prestigious medical systems of Stanford, the University of California at Davis, Yale, and the University of Pennsylvania have all within the past five years instituted rules barring their physicians and residents from accepting any gifts, no matter how small, from PSRs. Hafemeister, *supra* at 517. The American Medical Students' Association has also been proactive in discouraging medical schools from accepting educational money from pharmaceutical companies, and has been calling on medical schools "to implement curricula that prepare students to interact with industry in a way that protects individual patients, promotes public health, and preserves the public trust in medicine." American Medical Students Associations, *PharmFree Curriculum* 2 (2011).

Even pharmaceutical companies have begun to shift their tactics in recognition that the proper relationship between PSR and doctor is one of education and information provision. As of 2009, the Pharmaceuticals Research and Manufacturers of America (PhRMA), which represents research-based pharmaceutical companies, has issued its own professional code which discourages industry representative from using sales techniques to pressure physicians into prescribing target drugs. The PhRMA code prohibits the practice of "gifting," making it unprofessional for PSRs to leave even token gifts such as pens or sticky notes to doctors, while stating that "[n]othing should be offered or provided in a manner or on conditions that would interfere with the independence of a healthcare professional's prescribing practices." Pharmaceutical Research and Manufacturers of America, *Code on Interactions with Healthcare Professionals* at 13. The role of PSRs, according to the PhRMA Code is to deliver "accurate, up-to-date information to healthcare professionals about the approved indications, benefits and risks of pharmaceutical therapies." *Id.*, at 14.

At the same time, legal restrictions are also arising for the purpose of stemming unethical PSR influence on doctors. Starting in March, 2013, pharmaceutical manufacturers will be legally required to report all payments or transfers of value to physicians that exceed $100 in each calendar year, including honoraria, food, and travel. *See* Pub. L. 111-148 § 6002. Similarly, the Department of Health and Human Services has put out a guidance document warning doctors that accepting gifts of any sort from PSRs may violate the Federal Anti-Kickback Statute. *See* Department of Health and Human Services, Office of the Inspector General, *OIG Compliance Program Guidance for Pharmaceutical Manufacturers*, 68 Fed. Reg. 23731 (May 5, 2003) ("[I]f the remuneration is intended to generate any federal health care business, it potentially violates the anti-kickback statute.").

Doctors generally do not view themselves merely as commercial consumers of goods presented to them by PSRs. *See* Manchanda, *supra*, at 787. Evidence that practices such as "gifting" may influence doctors, or that the industry has engaged in marketing strategies that violate the ethics of medical practices, has raised red flags among the medical community, and has prompted calls for government and self-regulation of the industry. *See, e.g.*, David M. Studdert et al., *Financial Conflicts of Interest in Physician Relationship with the Pharmaceutical Industry Self-Regulation in the Shadow of Federal Prosecution*, 351 New Eng. J. Med. 1891, 1899 (2004).

The presence of these issues should not cause the courts to recast the relationship between physicians and PSRs as one of buyers and sellers. Indeed, to do so would undermine recognition of the necessity for doctors' professional independence.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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February 6, 2012

APPENDIX

List of Amici Curiae

Dr. Howard Brody. Howard Brody arrived at the Institute for Medical Humanities in May, 2006 to assume the position of Director. Previously, he was University Distinguished Professor of Family Practice, Philosophy, and the Center for Ethics and Humanities in the Life Sciences at Michigan State University, East Lansing. He served as Director of MSU's Center for Ethics and Humanities from 1985 to 2000. Dr. Brody received his M.D. degree from the College of Human Medicine, Michigan State University in 1976, and his Ph.D. in Philosophy, also from Michigan State University, in 1977. He completed a residency in family practice at the University of Virginia Medical Center, Charlottesville.

Dr. Brody has also written numerous articles on medical ethics, family medicine, and philosophy of medicine. Current research interests include the importance of an interdisciplinary humanities base for bioethics, ethical issues in primary care, community engagement in bioethics, and professional integrity in both medical practice and clinical research.

Dr. Brody was elected President of the Society for Health and Human Values (now part of the American Society for Bioethics and Humanities) in 1988-89. In 1993-94, Dr. Brody served as Senior Scholar in Residency for the American Academy of Family Physicians at the Agency for Health Care

Policy and Research in Rockville, MD; he also chaired the Michigan Commission on Death and Dying. In 1995, he was elected to the Institute of Medicine of the National Academy of Sciences. He has been invited to lecture in Great Britain, New Zealand, Norway, Denmark, Germany, Argentina, Japan, and China. His work has been translated into six languages.

Dr. Gregory Curfman. Dr. Gregory Curfman's career as a medical editor at the *New England Journal of Medicine* spans 26 years. He is currently the executive editor of the *Journal*, a position that he has held for 12 years. Prior to being appointed executive editor, he served as deputy editor of the *Journal* for 14 years. The *New England Journal of Medicine* is an international journal that has been published for over 200 years. It includes a wide range of articles and multimedia features across the spectrum of clinical medicine, basic research, health care policy, and ethics and health law. It has the highest impact factor of any medical journal.

Dr. Curfman is a board-certified internal medicine physician and cardiologist, and he is also an assistant professor of medicine at Harvard Medical School. He graduated magna cum laude from Princeton University, and cum laude from Harvard Medical School. He trained in internal medicine and cardiology at Massachusetts General Hospital and Brigham & Women's Hospital in Boston, and during his medical career he has served as director of the coronary care units at Brigham & Women's Hospital and the Dartmouth Hitchcock Medical Center. He also was medical director of the Cardiovascular

Health Center, a heart-disease prevention center at Massachusetts General Hospital.

He joined the editorial staff of the *New England Journal of Medicine* in 1986, where he now serves as the principal editor for cardiovascular disease. He also founded and directs the Perspective section of the *Journal*, which is the lead section of the *Journal* focused on issues at the interface of medicine and society. The conception and development of this section of the *Journal* stands as one of his signature accomplishments. A principal topic area covered in the Perspective section is health policy and health care reform, and Dr. Curfman has been responsible for the publication of many hundreds of articles and multimedia features in the health policy arena. Perspective articles are often covered in the public media, and many are included in the health policy curriculum at Harvard Medical School.

Dr. Curfman has written 60 editorials and Perspective articles for the *Journal* on a variety of topics in medicine and health care, including health policy, health law, and the regulation of drugs and medical devices. He has also given testimony before committees and subcommittees of the U.S. Senate and House of Representatives on the regulation and safety of medical devices. As executive editor, he was responsible for responding to subpoenas and undergoing legal depositions in relation to Vioxx product liability litigation. He communicates frequently with the public media, including the *New York Times*, the *Wall Street Journal*, and the *Boston Globe*.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

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No. 11-204

In The
Supreme Court of the United States

◆

MICHAEL SHANE CHRISTOPHER
and FRANK BUCHANAN,

Petitioners,

v.

SMITHKLINE BEECHAM, CORP.,
D/B/A GLAXOSMITHKLINE,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

◆

BRIEF OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

◆

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STATEMENT OF INTEREST[1]

The National Employment Lawyers Association ("NELA") is the largest professional membership organization in the country comprised of lawyers who represent workers in labor, employment and civil rights disputes. Founded in 1985, NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. NELA and its 68 state and local affiliates have a membership of over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA's members litigate daily in every circuit, affording NELA a unique perspective on how the principles announced by the courts in employment cases actually play out on the ground. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. To ensure that the rights of working people are protected, NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and other federal appellate courts regarding the proper interpretation of the Fair Labor Standards

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[1] The parties' counsel did not author this brief in whole or in part, nor did the party or the party's counsel contribute money intended to fund the preparation or submission of the brief. No person other than the *Amici Curiae*, their members, or their counsel contributed money that was intended to fund the preparation or submission of the brief. Counsel of record for both parties have consented to the filing of this brief.

Act, 29 U.S.C. §§ 201 *et seq.*, and other federal workplace rights laws.

The National Employment Law Project ("NELP") is a non-profit legal organization with 40 years of experience advocating for the employment and labor rights of low-wage workers. In partnership with community groups, unions, and state and federal public agencies, NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the basic workplace protections guaranteed in our nation's labor and employment laws. NELP has litigated and participated as *amicus* in numerous cases addressing the rights of workers under the Fair Labor Standards Act, as well as other federal workplace rights laws.

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SUMMARY OF ARGUMENT

When Congress adopted the overtime requirements of the Fair Labor Standards Act ("FLSA") in 1938, it included a narrow exemption for a category of employees, "outside salesman," 29 U.S.C. § 213(a)(1), who under the common law were those who made sales, not those who solely promoted products. The "salesman" to whom the exemption applies means – just as the Secretary of Labor has explicitly defined it – a person who "mak[es] sales," in accordance with the purpose of the exemption and the common meaning of the term. *See* 29 C.F.R. § 541.500(a)(1)(i)-(ii) (primary duty of exempt outside sales employees must be to make sales within the meaning of section 3(k) of the Act or to obtain orders or contracts for services); 29 U.S.C. § 203(k) (defining "sale" to "include[ ] any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition").

The requirement that an employee make sales to be deemed a "salesman" has been central to limiting the reach of the "outside salesman" exemption. Honoring this requirement, in the spirit of giving exemptions to the FLSA a narrow construction, effectuates the Act's long-recognized purposes: to have the broadest impact in eliminating unhealthy labor conditions and fostering the creation of jobs. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 577-78 (1942) (discussing the goals of the FLSA). The requirement that outside sales employees actually make sales in order to qualify for the exemption has the virtue of providing a bright line for courts and human resource professionals to follow.

This Court should accordingly reject the Ninth Circuit's loose construction of "salesman," which stretches the term beyond its common meaning and beyond the Secretary's definition merely to rope a single, industry-specific class of employees – pharmaceutical sales representatives (also known as "detailers") – into the exemption. Diluting the requirement that an employee must make sales to fall within the exemption introduces uncertainty to the law and exposes a wide swath of other workers to exclusion from FLSA overtime and minimum wage safeguards. Any decision as to whether the "outside salesman" exemption should be modified to include an industry-specific category of workers such as detailers is the proper domain of Congress and the Secretary of Labor.

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ARGUMENT

I. Requiring Outside Sales People to Make Actual Sales Is Central to the Purpose of the Exemption.

A. The Pre-FLSA Law Governing "Traveling Salesmen" Focused on Making Actual Sales.

The meaning of the term "outside salesman" is apparent from the substantial case law involving outside sales employees decided prior to the enactment of the FLSA. *See Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1332 (2011) (citing pre-FLSA common law cases to construe meaning of the word "filed" in 29 U.S.C. § 215(a)(3)). When the FLSA was enacted in 1938, the "contemporaneous judicial usage," *id.*, of the term outside (or more commonly, traveling) "salesman" was someone who actually sold goods, not just promoted the sale of goods. In *United States Bedding Co. v. Andre*, 150 S.W. 413 (Ark. 1912), the Supreme Court of Arkansas expressed this consensus:

> *The purpose for which a traveling salesman is employed is to solicit orders and make sales of goods.* . . . It has been held by this court that a traveling salesman is only authorized to solicit orders and make sales. . . .

Id. at 414 (emphasis added); *see also Commerce Furniture & Undertaking Co. v. White Sewing Mach. Co.*, 222 P. 516, 517 (Okla. 1924) (referring to *Andre* definition of traveling salesmen as a "well-known rule in the commercial world"). In relevant part, the *Andre* court held that a traveling salesman's authority as a company agent is confined to the sales he transacted, not to other related activities such as promotion. *Andre*, 150 S.W. at 414 (salesperson did not have implied authority to enter into contract to post buyer's advertisements on billboards; "[t]he power to make contracts for advertising cannot be implied from the power to sell goods and solicit orders").

Courts of the era, in various contexts, considered selling, rather than promoting, to be the centerpiece of being a "salesman." *See, e.g.*, *Falletti v. Carrano*, 103 A. 753, 753 (Conn. 1918) ("Rivkin's authority was that of an outside salesman of a wholesale grocery house with unrestricted powers of sale and collection," which was "indispensable in the business which he was employed to conduct"); *Upchurch v. City of La Grange*, 125 S.E. 47, 50 (Ga. 1924) (traveling salesman is one who "travels from city to city or town to town in this state, exhibiting samples *and taking orders*") (emphasis added); *Tweedie Footwear Corp. v. Roberts-Schofield Co.*, 285 P. 476, 477 (Idaho 1930) ("extent of his authority is merely to solicit orders and transmit the same to his principal for acceptance"); *Royal Indem. Co. v. Siders*, 257 Ill. App. 100, 106 (Ill. App. Ct. 1930) ("[a] traveling salesman has been defined as one who goes out and solicits business, takes orders for goods, etc."); *Consol. Grocery Co.'s Tr. in Bankr. v. Hadad*, 53 S.W.2d 951, 952 (Ky. 1932) ("Mullins, being a traveling salesman, had no authority to do aught than solicit orders and transmit them to his principal"); *T.C. May Co. v. Menzies Shoe Co.*, 113 S.E. 593, 594 (N.C. 1922) ("a salesman who takes or solicits orders for goods and forwards them to his principal for approval or rejection"); *Floor v. Mitchell*, 41 P.2d 281, 286 (Utah 1935) ("the extent of his authority is to solicit orders and transmit them"); *Montgomery Ward & Co. v. Arbogast*, 81 P.2d 885, 890 (Wy. 1938) (collecting authority).

The Court can presume that Congress knew this background law and incorporated it when it adopted the FLSA. *See, e.g.*, *Utah v. Evans*, 536 U.S. 452, 475 (2002) (citing "contemporaneous general usage" in defining term in Census Act); *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) ("when Congress uses language with a settled meaning at common law," it is presumed to adopt the widely accepted meaning); *United States v. Shabani*, 513 U.S. 10, 13-14 (1994) (following "the settled principle of statutory construction that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms"). Against this backdrop, therefore, inclusion of "outside salesman" among the FLSA exemptions should be understood to mean those employees whom the law regarded as falling within this category, *i.e.*, those who go out and "mak[e] sales," 29 C.F.R. § 541.500(a)(1)(i)-(ii).

B. Placing the Focus on Making Actual Sales Respects the Underlying Purpose of the Exemption.

The "executive," "administrative," "professional," and "outside salesman" exemptions in section 13(a)(1) of the FLSA are commonly referred to as the "white collar" exemptions. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed. Reg. 22,122 (Apr. 23, 2004). The unifying characteristic of these types of positions is their individualized nature.[2] As the Secretary of Labor observed in the Preamble to the 2004 final rule, the legislative history indicates that the type of work performed by employees subject to the "white collar" exemptions "was difficult to standardize to any time frame and could not be easily spread to other workers after 40 hours in a week, making compliance with the overtime provisions difficult." *Id.* at 22,123-24.

The underlying rationale for exempting outside salespersons is to exclude from the FLSA's coverage employees who work outside the supervision of the employer and whose compensation is directly tied to their ability to make their own sales. *See* Harold Stein, U.S. Dep't of Labor, "Executive, Administrative, Professional . . . Outside Salesman" Redefined at 46-47 (1940) ("Stein Report") (the exempt outside sales employee's earnings are customarily directly related to their working time, unlike outside employees who do not make sales, such as employees engaged in non-exempt promotional work). Unlike the other white collar exemptions, it is the outside sales employees' ability to make or consummate a sale and the amount of time they dedicate to their own sales efforts that determines their compensation, not their generalized executive or managerial responsibilities or their elevated status. *See* 69 Fed. Reg. at 22,177 (explaining that bona fide white collar employees are paid on a salary basis because their work is not measured by the hour or task). This rationale is reflected in the implementing regulations' requirement that the primary duty of exempt outside sales employees must be to make sales within section 3(k) of the FLSA or to obtain orders or contracts for services. 29 C.F.R. § 541.500(a)(1)(i)-(ii).

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[2] The Court should consider the meaning of the "outside salesman" exemption in the context of its placement within the same exemption as "bona fide executive, administrative, or professional capacity," under the maxim of *noscitur a sociis*: "that a word gathers meaning from the words around it." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 702 (1995) (internal quotation marks omitted).

The sales requirement also distinguishes outside sales employees from employees whose primary duty is something other than making individual sales. For example, employees who promote their employers' products without making sales are concerned with increasing sales *by others*: "[t]hese persons are engaged in paving the way for salesmen." Stein Report at 46. Their earnings are readily determined without reference to any individual sales efforts. Consequently, their work is compatible with an hourly plus overtime pay structure, and it can be spread among other employees. *Cf.* 69 Fed. Reg. at 22,123-24 (the type of work performed by exempt "white collar" employees cannot easily be spread to other employees after 40 hours per week). In contrast to promotion work, outside sales employees are concerned with making their own sales *to others*. Stein Report at 46. Their individual ability and initiative determines the volume of their sales and the amount of their compensation. Thus, their sales, not just their hours, are the true measure of their work.

The proposal that the "outside salesman" exemption be expanded to include work where no accompanying sales are made was expressly rejected by the Secretary of Labor in 1940, 1949, and again in 2004. *Id.* ("Thus, inasmuch as the promotion man's earnings are normally not directly related to his working time, as is customarily the case with outside salesmen, it is doubtful that the nature of his work requires or justifies an exemption from the provisions of the act."); Harry Weiss, U.S. Dep't of Labor, Report and Recommendations on Proposed Revisions of Regulations, Part 541, at 82 (1949) ("Weiss Report") ("promotional work which is incidental to sales made, or to be made, by someone else cannot be considered as exempt work"); 69 Fed. Reg. at 22,162 (rejecting industry requests "to eliminate the emphasis upon an employee's 'own' sales" in determining whether the "outside salesman" exemption applies). Ultimately, employees can only perform exempt outside sales work if they are actually employed to make their own sales:

> in borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling. If his efforts are directed toward stimulating the sales of his company generally rather than the consummation of his own specific sales his activities are not exempt.

Weiss Report at 83. As the statutory language and the history of the exemption demonstrate, the requirement that employees make their own sales is a defining characteristic of the "outside salesman" exemption. As evidenced by cases preceding the FLSA's enactment and subsequent FLSA case law, this emphasis on individual sales has been the hallmark of the "outside salesman" exemption since its inception.

C. Over 70 Years of FLSA Case Law Reinforces That the Exemption Is Confined to Those Who Actually Make Sales.

Consistent with the pre-FLSA cases, judicial application of the "outside salesman" exemption since the earliest years of the FLSA has adhered tightly to this model, *i.e.*, one who travels to the customer and collects orders or makes sales. *See, e.g., Jewel Tea Co. v. Williams*, 118 F.2d 202, 203-04 (10th Cir. 1941) (salesmen made regular visits door-to-door on a route to sell "coffee, tea, extracts, baking powder, laundry and toilet soaps, and other similar merchandise"); *Green v. Terminix Int'l, Inc.*, 649 F. Supp. 243, 244 (M.D. Fla. 1986) ("plaintiff's job consisted of two activities: the actual sale of pest control services and demonstrations and inspections which were 'incidental to and in conjunction with' plaintiff's sales and solicitations"); *Hodgson v. Krispy Kreme Doughnut Co.*, 346 F. Supp. 1102, 1103-06 (M.D.N.C. 1972) (drivers sold bakery goods from trucks, met with customers and made sales); *Hodgson v. Greene's Propane Gas Serv., Inc.*, Civ. No. 2502, 1971 WL 692, at *5-6 (M.D. Ga. Feb. 16, 1971) (employees delivered and sold propane on a route); *Bradford v. Gaylord Prods.*, 77 F. Supp. 1002, 1004-05 (N.D. Ill. 1948) (sales technicians for cosmetics company took orders for supplies purchased by jobber or distributor).

Conversely, employees who otherwise share traits with outside salespeople – working in the field, moving and promoting goods, even taking orders – are routinely found non-exempt if the making of actual sales is not part of their job. *See, e.g.*, *Skipper v. Superior Dairies, Inc.*, 512 F.2d 409, 413-16 (5th Cir. 1975) (dairy product route man who delivered products to customers and took orders, but did not solicit, not exempt); *Wirtz v. Atlanta Life Ins. Co.*, 311 F.2d 646, 648 (6th Cir. 1963) (supervisor "assigned to work directly with one of his agents, accompanying such agent on the agent's 'debit' route and assisting him with his collections and sales" not exempt as outside salesperson); and cases cited *infra* at § II.B. As explained below, a decision affirming the Ninth Circuit would invite a wholesale reinvention of this field by employers who, thus encouraged, would embrace the opportunity to creatively re-conceive various off-premises jobs as outside sales.

II. Eliminating the Requirement that an Employee Actually Make Sales Would Create a Rift in the System of Protections Afforded by the FLSA.

The Ninth Circuit opinion holds that the "outside salesman" exemption should cover employees who work outside in a capacity *close enough* to making sales for the employer, regardless of whether they actually make such sales. This judicial gloss contravenes the well-established principle that the broad and remedial purpose of the FLSA is intended to extend coverage to more workers and thus exemptions from the Act are construed narrowly. *See Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). In that same vein, a statutory standard of *close enough* injects uncertainty. If this standard is adopted, the exemption (and many other FLSA exemptions) would bulge with no clear stopping point, sowing doubts about coverage, exempting unintended categories of workers, and rendering meaningless the principle that exemptions be construed against the employer.

A. The Ninth Circuit Decision Violates the Principle that FLSA Exemptions Should Be Read Narrowly.

On June 25, 1938, Congress enacted the Fair Labor Standards Act, creating a minimum standard for hourly wages and a maximum number of hours an employee could work without receiving overtime compensation. 29 U.S.C. §§ 206, 207. The FLSA was enacted to eliminate the labor conditions that are detrimental to the health, efficiency and general welfare of workers, 29 U.S.C. § 202, and to encourage employers to spread employment opportunities rather than to lengthen the work week. *See Missel*, 316 U.S. at 577-78.

In his message to Congress urging passage of the Act, President Roosevelt explained that the Act is intended to ensure workers "a fair day's pay for a fair day's work" because "[a] self-supporting and self-respecting democracy can plead no . . . economic reason for chiseling workers' wages or stretching workers' hours." H.R. Rep. No. 101-260, at 8-9 (Sept. 26, 1989), *reprinted in* 1989 U.S.C.C.A.N. 696, 696-97. A half-dozen years later, this Court recognized the "remedial and humanitarian . . . purpose" of the FLSA, affirming that the Act does not deal "with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others." *Tenn. Coal, Iron & R.R. Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944).

More particularly, the FLSA established the general rule that employees must be compensated at one and one-half times their regular rate of pay for each hour worked in excess of 40 hours per week. 29 U.S.C. § 207(a)(1). Although the Act did not prohibit overtime work, it imposed a financial disincentive to its use. *Missel*, 316 U.S. at 577-78. The overtime protections of the FLSA are meant to apply widely even to those considered well-compensated, in order to ensure that employers do not overburden such workers with long weeks and deprive others of employment opportunities.[3] The FLSA protects workers regardless of their level of income, unless they satisfy the highly paid employee exemption, which potentially applies to employees making more than $100,000 per year. *See* 29 C.F.R. § 541.601. Indeed, this Court has repeatedly held that "employees are not to be deprived of the benefits of the Act simply because they are well paid." *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 741 n.18 (1981) (quoting *Jewell Ridge*

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[3] Despite this Congressional purpose, studies of the American workplace have shown that the average American across every industry, occupation, and income level has seen a dramatic rise in working hours which results in the very evils that Congress sought to remedy by passing the FLSA: decreased efficiency, increased stress on the worker, and an unhealthy workplace. *See* Brief of NELP, as *Amicus Curiae* in Support of Petitioners, *Auer v. Robbins*, 519 U.S. 452 (1997) (No. 95-897), 1996 WL 492324, at *11-12 (citing, *inter alia*, Juliet Schor, "The Overworked American: The Unexpected Decline of Leisure," Basic Books (1991)).

Coal Corp. v. Local No. 6167, United Mine Workers of Am., 325 U.S. 161, 167 (1945)).

It is against these legislative purposes that the section 213 exemptions are examined. This Court holds that the Act's "exemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit." *Arnold*, 361 U.S. at 392 (concluding that the three conditions of the Section 13(a)(2) retail or service establishment exemption are "explicit prerequisites to exemptions and not merely suggested guidelines for judicial determination of employer's status"); *see also Mitchell v. Ky. Fin. Co.*, 359 U.S. 290, 296 (1959) (finding that it would be unjustified for the Court to strain to bring the employer's activities within the literal words of the exemption because FLSA exemptions are to be narrowly construed). To do otherwise would be "to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips*, 324 U.S. at 493.

To depart from the long-standing principle that FLSA exemptions be construed narrowly and to dilute the plain language would embolden employers to distort other exemptions and seek subsequent judicial ratification. Courts have routinely rejected a similar *close-enough* standard when analyzing other exemptions, such as the educational requirement of the "learned professional exemption," 29 C.F.R. § 541.301; 29 U.S.C. § 213(a)(1). *See, e.g., Solis v. Washington*, 656 F.3d 1079, 1088 (9th Cir. 2011) (rejecting general academic training as substitute for "a prolonged course of specialized intellectual instruction" in finding social workers non-exempt); *Young v. Cooper Cameron Corp.*, 586 F.3d 201, 205-06 (2d Cir. 2009) (finding exemption cannot apply to engineering-related position if advanced education is not customarily required; distinguishing skill from education); *Vela v. City of Houston*, 276 F.3d 659, 675-76 (5th Cir. 2001) (deeming educational requirements for paramedics not sufficiently extensive to satisfy exemption's advanced knowledge requirement); *Reich v. Newspapers of New England, Inc.*, 44 F.3d 1060, 1078 (1st Cir. 1995) (finding journalists not exempt where position emphasized newsroom experience over journalism courses); *Dybach v. State of Fla. Dep't of Corrs.*, 942 F.2d 1562, 1565 (11th Cir. 1991) (finding probation officer non-exempt because job did not require specialized degree in a specific, relevant field).

Similarly, this Court and others have refused to apply a *close-enough* standard for the "retail establishment" exemption, 29 U.S.C. § 213(a)(2), *repealed* Pub. L. No. 101-157, § 3(c)(1), Nov. 17, 1989, 103 Stat. 939. *See, e.g.*, *A.H. Phillips*, 324 U.S. at 496-98 (strictly construing term "establishment" in deciding that the pertinent inquiry is not whether the business enterprise as a whole is engaged in retailing, but whether the particular establishment under scrutiny – a warehouse and central office – is engaged in retailing); *see also Schultz v. Adair's Cafeterias, Inc.*, 420 F.2d 390, 394 (10th Cir. 1969) (limiting a retail "establishment" to a single physical separate place of business rather than an integrated enterprise because a broader interpretation "runs directly contrary to the letter and spirit of the [FLSA]"); *Wirtz v. Keystone Readers Svc., Inc.*, 418 F.2d 249, 255-59 (5th Cir. 1969) (following the Supreme Court's definition of an "establishment" as a distinct physical place of business and concluding that defendant's central business office and door-to-door retailing do not qualify as "retail establishments").

Consistent with this Court's mandate that FLSA exemptions are to be read narrowly, an employee must in fact make or consummate sales to fall within the "outside salesman" exemption. To hold otherwise – as the Ninth Circuit did and Respondent asks the Court to do here – contradicts the common meaning of the term and frustrates the FLSA's broad remedial purpose.

B. The Ninth Circuit's Rationale Expands the "Outside Salesman" Exemption to Engulf Employees Who Work Outside in Any Capacity Related to Selling.

The Ninth Circuit's holding, if affirmed by the Court, threatens to undermine years of fidelity by the courts to the true meaning of "salesman," and guidance from the Secretary of Labor to employers on the same subject. It would expose many low-wage workers to exclusion from both the minimum wage and overtime safeguards of the FLSA, by employers that re-characterize their jobs as sales, even where the workers make no sales.[4]

The Ninth Circuit erred in concluding that detailers, although they do not actually make sales, were somehow uniquely comparable to sales people outside the pharmaceutical industry. *Cf. Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 398 (9th Cir. 2011) (describing the work of detailers). Like detailers, other categories of workers outside the pharmaceutical industry focus on promoting products or services with the end goal of increasing sales, and sometimes even receive payment in part on a commission basis, but do not themselves make sales. Courts and the Secretary of Labor have considered such workers to be eligible for minimum wage and overtime under the FLSA.

For example:

- "Merchandisers," who help stimulate sales by encouraging retailers to replenish their supply and ensuring products are marketed properly at retail stores, but often do not have the authority of the upper-level sales people to negotiate sales agreements. Like the detailers, the efforts of the merchandisers are directed at specific retailers, but they do not complete any sales. *See, e.g.*, *Campanelli v. Hershey Co.*, 765 F. Supp. 2d 1185, 1191 (N.D. Cal. 2011) (holding that plaintiffs who perform merchandising work are not engaged in making actual "sales" where upper-level salespeople negotiate the sales agreements); *see also Ackerman v. Coca-Cola Enters., Inc.*, 179 F.3d 1260, 1263-64 (10th Cir. 1999) (distinguishing merchandising from sales in holding that plaintiffs were exempt because they performed merchandising tasks that were "incidental to and in conjunction with" their sales of products).

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[4] The "outside salesman" exemption excludes employees within its reach from both overtime and minimum wage protection, 29 U.S.C. § 213(a), thus stripping them of the minimum protections from "substandard wages and oppressive working hours" which Congress sought to provide in the FLSA. *Barrentine*, 450 U.S. at 739.

- "Recruiters" and "solicitors," who are focused on networking, giving presentations, distributing flyers, and displaying publicity materials, and may target specific audiences or geographic areas, but who may not have the authority to obtain commitments. Such individuals may be military recruiters, magazine subscription solicitors, or the people who hand out flyers on the streets. *See, e.g.*, *Clements v. Serco, Inc.*, 530 F.3d 1224, 1228-29 (10th Cir. 2008) (holding that military recruiters who did not have authority to enlist recruits did not fall under the outside sales exemption); *Keystone Readers Serv., Inc.*, 418 F.2d at 253, 260 (magazine subscription solicitors, who canvass houses and obtain order cards, but do not collect money, are not engaged in "sales"); Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, 2006 WL 1698305, at *2 (May 22, 2006) (soliciting and obtaining promises of future charitable donations do not constitute "sales"); Opinion Letter, Wage & Hour

Div., U.S. Dep't of Labor, 1998 WL 852683, at *3 (Feb. 19, 1998) (recruiters who identify prospective students and obtain enrollment applications, but cannot complete the enrollment contract on behalf of the college, are not engaged in "sales"); Opinion Letter, Wage & Hour Div., U.S. Dep't of Labor, 1999 WL 1002391, at *2 (Apr. 20, 1999) (same). *Cf. Nielsen v. DeVry, Inc.*, 302 F. Supp. 2d 747, 754-56 (W.D. Mich. 2003) (field representatives for a college who continued their efforts until prospective students paid tuition and began attending classes fell under the outside sales exemption).

- Deliverymen who take orders or seek new customers on their routes, but do not contract to "sell." *See, e.g.*, *Hodgson v. Klages Coal & Ice Co.*, 435 F.2d 377, 383-84 (6th Cir. 1970) (routemen who talk to store managers to seek new customers are not making sales because store managers alone cannot enter a binding agreement to carry the products); *Reynolds v. Salt River Valley Water Users Ass'n*, 143 F.2d 863, 867-68 (9th Cir. 1944) ("zanjeros," who take orders for and deliver water to association shareholders, do not "sell" because the association does not own the water itself).

- "Sales representatives" or marketing representatives who, instead of focusing on completing sales, create networks of dealers through which the company distributes products, educate potential buyers about the product, and boost consumer desire to buy the product. *See, e.g.*, *Burling v. Real Stone Source*, No. 08 Civ. 43, 2009 WL 1812785, *5 (D.

Idaho June 24, 2009) (describing duties of a sales representative working for distributor of construction materials who is not an "outside salesman").

Because the Ninth Circuit offers no clear limitation on which employees are *close enough* to making a sale to fall under the "outside salesman" exemption, its conception of the exemption threatens to exclude all of these workers, many of whom are low-wage earners who have little discretion to manage their time at work, from the minimum wage and overtime protections of the FLSA. The narrow exemption should not be expanded to encompass such employees.

III. In the Absence of Congressional or Regulatory Action, the Court Should Not Dilute or Refashion the FLSA's Explicit Requirements for One Industry.

The FLSA statutory exemptions contained in 29 U.S.C. § 213 are products of Congressional drafting and compromise over a period of many years. They have been amended some twenty times since their enactment in light of modern business and industrial developments – eight times in the past twenty years alone.[5] The Secretary of Labor, in turn, has issued

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[5] June 25, 1938, c. 676, § 13, 52 Stat. 1067; Aug. 9, 1939, c. 605, 53 Stat. 1266; Oct. 26, 1949, c. 736, § 11, 63 Stat. 917; Aug. 8, 1956, c. 1035, § 3, 70 Stat. 1118; Aug. 30, 1957, Pub. L. No. 85-231, § 1(1), 71 Stat. 514; July 12, 1960, Pub. L. No. 86-624, § 21(b), 74 Stat. 417; May 5, 1961, Pub. L. No. 87-30, §§ 9, 10, 75 Stat. 71, 74; Sept. 23, 1966, Pub. L. No. 89-601, Title II, §§ 201

(Continued on following page)

and updated her own detailed regulations enforcing, defining, and interpreting the various FLSA exemptions.

In light of this dynamic history, the notion that the pharmaceutical industry requires *judicial* modification of the FLSA to bring the act up-to-date is unsustainable. Congress has time and again granted industry- and profession-specific exemptions under the FLSA. *See*, *e.g.*, 29 U.S.C. § 213(a)(5) ("any employee employed in the catching, taking, propagating, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life"); § 215(a)(8) ("any employee employed in connection with the publication of any weekly, semiweekly, or daily newspaper

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to 204(a), (b), 205 to 212(a), 213 to 215(b), (c), 80 Stat. 833 to 838; Oct. 15, 1966, Pub. L. No. 89-670, § 8(e), 80 Stat. 943; 1970 Reorg. Plan No. 2, § 102, eff. July 1, 1970, 35 F.R. 7959, 84 Stat. 2085; June 23, 1972, Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 375; Apr. 8, 1974, Pub. L. No. 93-259, §§ 6(c)(2), 7(b)(3), (4), 8, 9(b), 10, 11, 12(a), 13(a) to (d), 14 to 18, 20(a) to (c), 21(b), 22, 23, 25(b), 88 Stat. 61 to 69, 72; Nov. 1, 1977, Pub. L. No. 95-151, §§ 4 to 8, 9(d), 11, 14, 91 Stat. 1249, 1250 to 1252; Sept. 27, 1979, Pub. L. No. 96-70, Title I, § 1225(a), 93 Stat. 468; Nov. 17, 1989, Pub. L. No. 101-157, § 3(c), 103 Stat. 939; Sept. 30, 1994, Pub. L. No. 103-329, Title VI, § 633(d), 108 Stat. 2428; Dec. 29, 1995, Pub. L. No. 104-88, Title III, § 340, 109 Stat. 955; Aug. 6, 1996, Pub. L. No. 104-174, § 1, 110 Stat. 1553; Aug. 20, 1996, Pub. L. No. 104-188, § 2105(a), 110 Stat. 1929; Oct. 11, 1996, Pub. L. No. 104-287, § 7(5), 110 Stat. 3400; Nov. 13, 1997, Pub. L. No. 105-78, Title I, § 105, 111 Stat. 1477; Oct. 31, 1998, Pub. L. No. 105-334, § 2(a), 112 Stat. 3137; Jan. 23, 2004, Pub. L. No. 108-199, Div. E, Title I, § 108, 118 Stat. 236.

with a circulation of less than four thousand the major part of which circulation is within the county where published or counties contiguous thereto"); § 215(a)(10) ("any switchboard operator employed by an independently owned public telephone company which has not more than seven hundred and fifty stations"); § 215(b)(5) ("any individual employed as an outside buyer of poultry, eggs, cream, or milk, in their raw or natural state"). There is no need for courts to carve out additional exemptions to cover industry-specific conditions. Judicial intervention, if anything, might upset deliberate legislative compromises that are an important part of the FLSA history, as the Department of Labor has chronicled. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, Monthly Labor Review, July 1978, *available at* http://www.dol.gov/oasam/programs/history/flsa1938.htm.

This Court considers Congressional activity upon a statute as evidence of its meaning. *See, e.g., Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338-39 (1988) (noting numerous amendments to Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* as providing guidance to Congressional intent); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 17-18 (1987) (diversity jurisdiction, 28 U.S.C. § 1332); *McCain v. Lybrand*, 465 U.S. 236, 248 (1984) (Voting Rights Act, 42 U.S.C. § 1973c). That neither Congress nor the Executive branch has taken any action against the backdrop of years of litigation about the classification of detailers suggests that the definition of "outside salesman" requires no update at all. To the extent that GlaxoSmithKline and others in the pharmaceutical industry seek an "outside salesman" exemption specific to their industry, they should approach Congress instead of this Court. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010) ("[E]ditorial freedom [over a statute] belongs to the Legislature, not the Judiciary").

◆

CONCLUSION

This Court should reverse the Ninth Circuit's ruling and recognize that the FLSA's exemption for "outside salesm[e]n" should apply only to those who make sales.

Respectfully submitted,

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AMICUS
CURIAE
BRIEF

No. 11-204

IN THE
Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER, *et al.*,
Petitioners,
v.
SMITHKLINE BEECHAM, CORP., D/B/A
GLAXOSMITHKLINE,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

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IN THE

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MICHAEL SHANE CHRISTOPHER, *et al.*,
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v.
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Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
*for the Ninth Circuit***

BRIEF OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT

INTEREST OF THE *AMICUS*[1]

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals including all states encompassed by the Second and Ninth Judicial Circuits. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses.

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[1] No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Counsel of record for both parties have consented to the filing of this brief.

The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

NFIB represents over 300,000 member businesses nationwide, and its membership spans the spectrum of business operations. While NFIB members range from sole proprietor enterprises to firms with hundreds of employees, the typical NFIB member has ten employees and reports gross annual sales of approximately $500,000 per year and is covered by the Fair Labor Standards Act.

Without ready access to a team of expert attorneys, NFIB member businesses have enormous difficulty complying with existing and codified regulations. Small businesses with fewer than 20 employees already spend $10,585 per employee to comply with a vast array of federal regulations. Crain and Crain, *The Impact of Regulatory Costs on Small Firms* (September 2010) (report developed under contract with the U.S Small Business Administration).[2] The Code of Federal Regulations includes over 165,000 pages of regulations. Williams and Adams, *Regulatory Overload* (February 08, 2012).[3] NFIB estimates that 845 new regulations currently under consideration will affect small business. *NFIB Small Business for Sensible Regulation Project, Quick Facts.*[4]

If federal agencies, such as the U.S. Department of Labor (DOL), are permitted to announce substantive changes to codified regulations through unsolicited *amicus* briefs – without prior notice or sufficient publication of the new requirements – compliance becomes practically impossible. Additionally, many of NFIB's members employ individuals in outside sales positions, and thus, they will be impacted by DOL's decision to graft a new substantive requirement – the actual transfer of title to goods – into the regulatory definition of "sales". Because DOL's changed regulation will apply retroactively, NFIB member businesses could face substantial back wage liability. Thus, the questions presented in this case are of great importance to NFIB and its member businesses.

SUMMARY OF ARGUMENT

DOL's *amicus* does not merely "interpret" the regulations defining and delimiting the outside sales exemption. Rather, DOL is attempting to materially change those regulations by announcing that the outside sales exemption applies only to employees who actually and personally transfer title of goods. Comparison of the actual regulation defining the phrase "making sales", and DOL's various paraphrasing of the regulatory language compels the conclusion that DOL is regulating through *amicus*. The regulation provides that sales "includes" the transfer of title. DOL's *amicus* brief claims that sales "requires the transfer of title." DOL asserts – without explanation, authority or argument – that making sales "means transferring title to property," and the exemption applies "only if" the employee "transfers title to those goods to the buyer." DOL's proposed regulatory change is contradicted by FLSA statutory language, the legislative history of the FLSA, DOL's own regulations, and over 70 years of regulatory history.

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[2] Available at http://www.sba.gov/advocacy/7540/49291 (last visited on March 22, 2012).

[3] Available at http://mercatus.org/publication/regulatory-overload-0 (last visited on March 22, 2012).

[4] Available at http://www.sensibleregulations.org/resources/facts-and-figures (last visited on March 22, 2012).

Petitioners cannot prevail unless DOL's proposed regulatory change is accepted. Except for the technical transfer of title to property, which other laws prevent Petitioners from performing, the pharmaceutical sales representative (PSR) job has every traditional indicia of outside sales as articulated by DOL in 1940, *see* Report and Recommendations of the Presiding Officer (Harold Stein) on Proposed Revisions of Regulations, Part 541 at 53 (Oct. 10, 1940) ("Stein Report"), and the Tenth Circuit's 1941 decision in *Jewel Tea Co. v. Williams*, 118 F.2d 202, 207-08 (10th Cir. 1941).

Because DOL's *amicus* brief attempts to change the regulatory requirements for exemption, not merely interpret existing regulatory language, DOL is not entitled to deference. Moreover, deference should not be given to DOL's position because it is entirely contrary to the statute, its own regulations, and the legislative and regulatory history. To afford deference to DOL in this matter would have immediate and devastating impacts on businesses – particularly small businesses – as it would result in retroactive liability and unfair surprise. Accordingly, the Ninth Circuit's holding below should be affirmed.

ARGUMENT

I. DOL'S LITIGATION POSITION REPRESENTS A MATERIAL CHANGE TO THE REGULATORY REQUIREMENTS FOR EXEMPTION AS AN OUTSIDE SALES EMPLOYEE

A. Transfer of Title Is Not Required for the Outside Sales Exemption

DOL's *amicus* brief attempts to graft a new, substantive requirement onto the regulations defining the outside sales exemption: An actual transfer of title to goods. This new regulatory requirement cannot be found either in the Fair Labor Standards Act or the Labor Department's codified regulations defining and delimiting the outside sales exemption.

Congress enacted the FLSA's minimum wage and overtime standards to combat "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202(a). The FLSA was intended to protect low-wage workers – not all workers. *See e.g.*, S. Rep. 75-884 at 3 (1937) (FLSA intended to improve the standard of living for "those who are now undernourished, poorly clad, and ill-housed."); S. Rep. 81-640, at 1-2 (1949) (FLSA intended to "promote economic justice and security for the lowest paid of our wage earners."). While the FLSA was enacted to protect American workers from "substandard labor conditions," *Roland Elec. Co. v. Walling*, 326 U.S. 657, 669-70 (1946), achieving the "goal of ameliorating the uglier side of a modern economy did not imply that all workers were equally needful of protection". *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997). In fact, Congress recognized that many workers are not in need of the FLSA's protections by enacting over 50 partial and complete exemptions to the minimum wage and overtime requirements of the FLSA. *See* Appendix A for a listing of FLSA exemptions.[5]

Relevant here is the exemption for employees employed "in the capacity of outside salesmen." 29 U.S.C. § 213(a)(1). Section 3(k) of the FLSA defines the terms "sale" and "sell":

> "Sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

29 U.S.C. § 203(k). The outside sales exemption is not further defined in the FLSA, which instead provides that the exemption is to be "defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the [Admin-

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[5] We join with *amicus curiae* Chamber of Commerce of the United States in questioning the oft-repeated canon that FLSA exemptions must be construed narrowly against the employers seeking to assert them, with application limited to employees plainly and unmistakably exempt. The enactment of over 50 different FLSA exemptions seems inconsistent with the notion that Congress intended the FLSA to protect virtually every employee. Since universal coverage was not Congress' intent, there is no basis for creating a presumption against exemption beyond the employer's normal burden of proof.

istrative Procedures Act]." 29 U.S.C. § 213(a)(1).[6] DOL has exercised this authority, most recently in 2004 after APA notice and comment rulemaking, by issuing the regulations found at 29 C.F.R. Part 541, Subpart F.

DOL's regulations, 29 C.F.R. § 541.500(a)(1), provide that the outside sales exemption applies to any employee whose "primary duty" is "making sales within the meaning of section 3(k) of the Act."[7] In discussing the meaning of "sales," DOL's regulations do little more than restate the language of Section 3(k):

> Sales within the meaning of section 3(k) of the Act *include* the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" *includes* any sale, exchange, contract to sell, consignment for sale, shipment for sale, or *other disposition*.

29 C.F.R. § 541.501(b) (emphasis added).

DOL's *amicus* brief repeatedly paraphrases 541.501(b), rather than quoting this section – changing key language in the process:

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[6] When quoting this statutory language in its brief, U.S. Br. 9, DOL ends the quotation without ellipsis after the word "Secretary," thus deleting the essential requirement that the Secretary define and delimit the outside sales exemption through APA notice and comment rulemaking – not through *amicus* briefs.

[7] The regulations also require exempt outside sales employees to "customarily and regularly" be "engaged away from the employer's place or places of business in performing such primary duty." 29 C.F.R. § 541.500(a)(2). There is no dispute that the Petitioners meet this requirement.

> The regulations continue to provide that an outside salesman must be primarily engaged in making sales or obtaining service orders, 29 C.F.R. 541.500(a)(1)(i)-(ii); that making sales of goods *requires* the transfer of title to those goods, 29 C.F.R. 541.501(b); and that promotional work is not exempt unless it is directed toward consummation of the employee's own sales, 29 C.F.R. 541.503.

U.S. Br. 4 (emphasis added). Elsewhere, DOL asserts that making sales "*means* transferring title to property," *id.* at 10 (emphasis added); the exemption does not apply unless the employee "*actually transfers title* to the property," *id.* at 12-13 (emphases added); an employee sells goods "*only if* he transfers title to those goods to the buyer," *id.* at 14 (emphasis added); and the outside sales exemption applies "only to employees who consummate their own sales, *i.e., employees who transfer title to goods*," *id.* at 18 (emphasis added). *See also id.* at 25 ("selling" goods "means transferring title to property").

DOL changes the word "includes" in section 541.501(b) into a requirement that an exempt outside sales employee must actually and personally transfer title of goods. This is a substantive regulatory change. The word "includes" is illustrative – a transfer of title is sufficient to evidence that a sale has occurred, but not necessary. *See Samantar v. Yousuf*, 130 S. Ct. 2278, 2287 (U.S. 2010) (the word "include" in a statute "is meant to be illustrative rather than exhaustive.").

DOL's new regulatory requirement finds no support in the language of the FLSA. Section 3(k) of the Act does not state that a "sale" occurs "only if" there is a transfer of title: "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k). Rather, several of the commercial transactions in this list do not require a transfer of title: In a "consignment for title," the seller sends goods to a selling agent, but retains title to the property until the goods are sold. Whether and when title passes under a "contract to sell" is determined under the terms of the contract. Title to goods being shipped may not transfer until the shipment arrives at the intended destination. Because these transactions do not necessarily require transfer of title, DOL cannot rely on the *ejusdem generis* canon to establish that the phrase "other disposition" requires transfer of title.

DOL's reliance on the regulatory history of Part 541 is also futile. DOL has issued regulations defining and delimiting the outside sales exemptions on four occasions – 1938, 1940, 1949 and 2004. The original 1938 regulations were short, and contained no language regarding transfer of title:

> The term "employee employed . . . in the capacity of outside salesman" in section 13(a)(1) of the act shall mean any employee who customarily and regularly performs his work away from this employer's place of or places of business, who is customarily and regularly engaged in making sales as defined in section 3(k) of the act and who does no substantial amount of work of the same nature as that performed by nonexempt employees of the employer. For the purposes of this definition, recurrent routine deliveries, whether or not prior orders are placed by purchasers, and collections, shall not be considered sales.

See Stein Report at 53.

DOL mentions transfer of title for the first time in the 1940 Stein Report: "Generally speaking, the Division has interpreted section 3(k) of the act to include the transfer of title to tangible property and in certain cases, of tangible and valuable evidences of intangible property." *Id.* at 45. However, this mention is followed by a discussion of sales transactions which do not require transfer of title – "selling of time on the radio, the solicitation of advertising for newspapers or other periodicals and the solicitation of freight for railroads and other transportation agencies." *Id.* DOL concluded that "in a practical sense, these people are salesmen in that their activities are of the same nature as those of persons making sales within the meaning of section 3(k)." *Id.* To ensure such sales employees were not artificially excluded from the exemption, DOL decided "to add a further clause which will specifically include within the exemption persons engaged in selling activities of this type." *Id.*

Thus, in 1940, DOL specifically stated that the sales exemption applies to employees who do not actually transfer title of property if the "nature" of their activities is making sales "in a practical sense." DOL refused to limit application of the exemption to employees who actually transfer title.

The 1949 report on the "white collar" exemptions also includes no indication that the outside sales exemption requires the employee to actually transfer title of property. Report and Recommendations on Proposed Revisions of Regulations, Part 541, by Harry Weiss, Presiding Officer, Wage and Hour and Public Contracts Divisions, U.S. Department of Labor (June 30, 1949) ("Weiss Report"). Rather, DOL stated: "In borderline cases the test is whether the person is actually engaged in activities directed toward the consummation of his own sales, at least to the extent of obtaining a commitment to buy from the person to whom he is selling." *Id.* at 83. The outside sales exemption then applies, if the employee obtains a commitment to buy as opposed to a "binding" commitment. The phase "obtaining a commitment to buy" in the Weiss Report, modifies the phrase "his own sales", thus implying some lesser requirement than an actual transfer of title. In fact, in 1949, DOL rejected such a rigid rule by stating: "With such variations in the methods of selling and promoting sales each case must be decided upon its facts." *Id.*

Although a bit outdated, DOL's example of a manufacturing representative who sells a product owned by another company – the "jobber" – is a clear indication that, in 1948, DOL did not interpret the outside sales regulation as requiring transfer of title:

> One situation involves a manufacturer's representative who visits the retailer for the purpose of obtaining orders for his employer's product, but transmits any order he obtains to the local jobber to be filled. Since this representative sells a specific commodity which is the property of the jobber rather than his employer the question has been raised whether he may be said to be engaged in making "sales" within the meaning of section 3(k) of the act. Applying the test recommended above, it is clear that the employee is performing sales work regardless of the fact that the order is filled by the jobber rather than directly by his own employer. The sale in this instance has been "consummated" in the sense that the salesman has obtained a commitment from the customer."

Id. In this example, the manufacturing representative could not have transferred title to the property because the property was not owned by his employer. Yet, DOL concluded that the manufacturer's representative was an exempt outside sales employee.

The outside sales regulations went unchanged from 1949 to 2004. As required under the Administrative Procedures Act, DOL proposed revisions to the Part 541 "white collar" overtime exemptions in 2003 and requested comments from the public. DOL reviewed the 75,280 comments submitted, and published final regulations in 2004. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Proposed Rule, 68 Fed. Reg. 15560 (March 31, 2003) (signed by Wage & Hour Administrator T. McCutchen) ("2003 Proposed Rule"); Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, Final Rule, 69 Fed. Reg. 22122 (Apr. 23, 2004) (signed by Wage & Hour Administrator T. McCutchen) ("2004 Final Rule").

DOL contends that the 2004 Final Rule "did not make any relevant substantive changes." U.S. Br. 4. DOL is wrong. The 2004 Final Rule did make a substantive change to 29 C.F.R. § 541.503, the very regulation upon which DOL now relies so heavily in this case – a change designed to ensure that an employee's failure to complete technical requirements for completing a sale under commercial law (such as transferring title) does not preclude application of the outside sales exemption.

The 2004 Final Rule incorporated an example from the 1948 Weiss Report, but with some important differences. The 1948 Weiss Report contained the following example of an employee who does not make a sale:

> Still another type of situation involves the representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, *consults with the manager as to the requirement of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chain-store company which later ships the quantity requested*. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Since the manufacturer's representative in this instance does not consummate the sale nor direct his efforts toward the consummation of a sale, (the store manager often has no authority to buy) this work must be counted as nonexempt.

Weiss Report at 84 (emphasis added).

In 2004, DOL revised this 1949 example by eliminating the language: "consults with the manager as to the requirement of the store, fills out a requisition for the quantity wanted and leaves it with the store manager to be transmitted to the central warehouse of the chain-store company which later ships the quantity requested." *See* 29 C.F.R. § 541.503(c). The final regulation, therefore, provides as follows:

> Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory

> runs low, *but does not obtain a commitment for additional purchases.* The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

Id (emphasis added). The Preamble to the 2004 Final Rule states that these changes to 29 C.F.R. § 541.503(c) were made "to address commenter concerns that technological changes in how orders are taken and processed should not preclude the exemption for employees whose primary duty is making sales". 69 Fed. Reg. at 22162.

In other words, the language was deleted in 2004 because, in DOL's opinion published in the Federal Register after the notice and comment rulemaking, an employee who obtains a commitment to buy by filling out a requisition for a quantity of goods, and leaving the requisition with the store manager to be transmitted later, meets the requirements for the outside sales exemption – despite the absence of a title transfer. "Exempt status should not depend on whether it is the sales employee or the customer who types the order into a computer system and hits the return button. The changes to proposed section 541.503(c) are intended to avoid such a result." *Id.* at 22163.

Thus, DOL in 2004 rejected the overly technical "interpretation" advanced by DOL today in its *amicus* brief. Rather, DOL restated that the outside sales exemption applies if "the employee, in some sense, has made sales":

> Nonetheless, the Department agrees that technological changes in how orders are taken and processed should not preclude the exemption for employees who in some sense make the sales. Employees have a primary duty of making sales if they "obtain a commitment to buy" from the customer and are credited with the sale.

Id. (citing Stein Report at 46; Weiss Report at 83).

B. Application of the Outside Sales Exemption Should Turn on the Nature of the Employee's Work

DOL's addition of a new "title transfer" requirement for the outside sales exemption is unsupported by the FLSA's definition of "sales", the Part 541 regulations, and a regulatory history dating back to 1940.

However, failure to apply such a rigid standard does not leave us without a basis for determining application of the exemption. DOL itself provided the regulated public with an easily applicable analysis in 1940, when it stated:

> In border-line cases, a determination can be made in the light of facts that will illustrate the actual nature of the employee's work. Among factors to be considered are: the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; proportion of earnings directly attributable to sales effort; description of occupation in union contracts; comparison of duties of employees in question and of other employees engaged as (a) truck drivers and (b) salesman; possession of salesman's or solicitor's license when such a license is required by law or ordi-

> nance; and presence or absence of customary or contractual prearrangements concerning amount to be delivered.

Stein Report at 51-52.

In 1941, the Tenth Circuit articulated similar factors when discussing the reasons for excluding outside sale employees from the FLSA's protections:

> The reasons for excluding an outside salesman are fairly apparent. Such salesman, to a great extent, works individually. There are no restrictions respecting the time he shall work and he can earn as much or as little, within the range of his ability, as his ambition dictates. In lieu of overtime, he ordinarily receives commissions as extra compensation. He works away from his employer's place of business, is not subject to the personal supervision of his employer, and his employer has no way of knowing the number of hours he works per day.

Jewel Tea Co., 118 F.2d at 207-08.

Combining the principles set forth by DOL and the Tenth Circuit (and putting those standards in more modern language) whether an employee qualifies for the outside sales exemption should depend on the nature of the job as a whole, with the following factors indicating that the employee has a primary duty of "sales":

1. The employer considers the sales experience of applicants when hiring;

2. The employer's job description indicates selling as an important job duty;

3. The employee receives training on sales skills and techniques;

4. The employee attends sales meetings and conferences;

5. The employee performs daily tasks independently and is not closely supervised;

6. The employee controls his own work hours;

7. The employee visits potential customers to seek commitments to purchase, whether binding or non-binding;

8. The employee's job performance is evaluated based on sales techniques and results;

9. The employer credits the employee with the sale, as evidenced by the employee earning commissions, bonuses or other compensation based on his own sales efforts; and

10. The employee earns well above the minimum wage.

Of course, none of these factors should be dispositive. Instead, as with all the "white collar" exemptions, application of the outside sales exemption must be determined in light of all facts and circumstances.

Applying these factors to determine application of the exemption is consistent with the purpose of the FLSA and the outside sales exemption. As stated above, the purpose of the FLSA is to "promote economic justice and security for the lowest paid of our wage earners." S. Rep. 81-640, at 1-2 (1949). Enacting over 50 exemptions from the FLSA's protections, Congress has recognized that many workers are not in need of the FLSA's protections – including "white collar" workers. As the legislative history of the FLSA indicates, the white-collar exemptions to the FLSA "were premised on the belief that the workers exempted typically earned salaries well above the minimum wage, and they were presumed to enjoy other compensatory privileges such as above average fringe benefits and better opportunities for advancement, setting them apart from the nonexempt workers entitled to overtime pay." Preamble to the 2004 Final Rule, 69 Fed. Reg. at 22123-24.

Further, exempt employees – such as outside sales employees – perform work that is difficult to standardize to a specific time frame and cannot be easily spread to other workers after 40 hours of work have been performed in a workweek. *See id.* Like other "white collar" workers, outside sales employees who meet most of the factors suggested above do not need the FLSA's protections because they have greater control over their work hours and, in lieu of overtime, working longer hours generally is rewarded by the ability to earn commissions or other incentive compensation tied to sales.

There is no danger that application of these suggested factors could result in an outside sales exemption for "every employee of a manufacturing company" because "every such employee presumably contributes in some fashion to sales of the company's products." U.S. Br. 33. The factors articulated by DOL in 1940 and the Tenth Circuit in 1941 require far more than merely "facilitating sales" and would not lead to exemption for "every employee whose actions *facilitate* sales." *Id.*

Respondent's brief establishes that the pharmaceutical sales representative (PSR) position meets all of the suggested factors, and that analysis need not be repeated here. In short, PSRs are hired and trained to sell; control their own work hours; are not closely supervised; obtain commitments from doctors to prescribe Respondent's pharmaceuticals; are evaluated and receive bonus compensation based on sales in their assigned geographic territories; and are compensated well in excess of minimum wage – up to $100,000 per year. PSRs are not vulnerable low-wage workers in need of the FLSA's protections.[8]

II. DOL'S NEW "TRANSFER OF TITLE" REQUIREMENT IS OWED NO DEFERENCE BECAUSE IT IS CONTRARY TO THE FLSA AND DOL'S OWN REGULATIONS

The Ninth Circuit strongly disagreed with the Second Circuit on the issue of whether to give deference to DOL's new "transfer of title" requirement. Reversing the Ninth Circuit on this issue would cause havoc among small businesses.

Plaintiffs' attorneys began filing putative collective actions alleging the PSRs were improperly denied overtime pay in late 2006 and early 2007. *See, e.g., Amendola v. Bristol-Myers Squibb Co.*, 558 F. Supp. 2d 459 (S.D.N.Y. 2008); *Barnick v. Wyeth*, 522 F.

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[8] DOL makes too much of the distinction between "promotion" and "sales" work. Promotion work related to an employer's own outside sales is exempt work. 29 C.F.R. § 541.503(a) ("Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work."). Whether promotion work is "incidental to and in conjunction with" Petitioner's sales depends on the meaning of the phrase "making sales." Thus, it is unnecessary for the Court to muck through the weeds of distinguishing "sales" from "promotion". The entire repetitive discussion of this issue in DOL's *amicus* brief is a red herring. Application of the exemption in this case turns on a single issue: Does a "sale", as defined under Section 3(k) of the FLSA, require an employee to actually and personally transfer title to property?

Supp. 2d 1257 (C.D. Cal. 2007). Initially, most district courts found that PSRs qualified for the outside sales exemption. *See., e.g., Delgado v. Ortho-McNeil, Inc.*, No. 07 Civ. 263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009); *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. 07 Civ. 00127, 2009 WL 3326632, at *6 (C.D. Cal. Feb. 6, 2009); *Baum v. Astrazeneca LP*, 605 F. Supp. 2d 669, 685-86 (W.D. Pa. 2009) (under analogous state law); *Menes v. Roche Labs., Inc.*, No. 07 Civ. 01444, 2008 WL 6600518, at *2 (C.D. Cal. Jan. 7, 2008) (same); *D'Este v. Bayer Corp.*, No. 07 Civ. 3206, 2007 WL 6913682, at *4 (C.D. Cal. Oct. 9, 2007) (same).

Prior to these decisions, DOL had never determined that PSRs were non-exempt and had never stated that the outside sales exemption requires actual transfer of title to property – despite the entire pharmaceutical industry classifying PSRs as exempt outside sales. *See Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007) (while it is "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible hypothesis is that the . . . industry has been left alone" because it was in compliance).

The Ninth Circuit refused to grant deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to DOL's new "transfer of title" rule – first raised in an unsolicited *amicus* brief submitted in *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). *See Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 394 (9th Cir. 2011). Specifically, the court held that the position of the DOL did not warrant *Auer* deference because the DOL regulation defining "making sales" essentially "parroted" the statutory language. *Id.* at 395. This is the correct conclusion as it places proper limits on an agency's attempts to informally issue interpretations of statutory language. Allowing otherwise would improperly circumvent the requisite formal rulemaking procedures.

A. *Auer* Deference Is Not Afforded Where An Agency Merely "Parrots" Statutory Language

As discussed above, DOL's new "transfer of title" requirement represents a material departure from its outside sales regulations, and is unsupported by the language of section 3(k) of the act, the outside sales regulations and 70 years of regulatory history. Deference is entirely unwarranted in this circumstance:

> We have never applied [deference] to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice. To the contrary, we have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question. . . . Deference to what appears to be nothing more than an agency's convenient litigation position would be entirely inappropriate.

Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 212-13 (1988).

The facts underlying the holding in *Auer* are instructive and present a meaningful distinction to DOL's current efforts to revise its regulations. In *Auer*, the Court requested an *amicus* brief from DOL to address the appropriate scope of the salary basis test. The salary basis test for the executive, administrative and professional exemptions under section 13(a)(1) of the FLSA was adopted by DOL in its initial 1938 regulations. The Court reasoned that "[b]ecause the salary-basis test is a creature of the Secretary's own regulations", DOL's interpretation of it "is controlling unless 'plainly erroneous or inconsistent with the regulation'". *Auer*, 519 U.S. at 461.[9] However, such deference is warranted only when the agency interprets its own ambiguous regulations. *See id.*

Here, DOL's position is not aimed at interpreting an ambiguous regulation. Any ambiguity instead lies in the statutory language, which is merely reiterated by DOL's implementing regulations. To permit DOL to now announce new regulations through unsolicited court filings improperly bypasses formal rulemaking procedures and is inconsistent with *Auer*.

Auer was not intended to supplant the public regulatory process, as the Court made clear in *Gonzales v. Oregon*, 546 U.S. 243, 256-57 (2006). As here, the regulation subject to agency interpretation in *Gonzales* did little more than restate the terms of the statute itself. *Id.* at 257. In holding that *Auer* deference should not be given where the regulatory language merely "parrots" the statute, the Court noted that an agency "does not acquire special authority to interpret its own words when, instead of using its expertise and experience to formulate a regulation, it has elected merely to paraphrase the statutory language." *Id.* To allow otherwise would permit regulation with no public oversight or input. "To defer to the agency's position would be to permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris County*, 529 U.S. 576, 587-588 (U.S. 2000). Accordingly, the Ninth Circuit's sound and well-reasoned analysis regarding the appropriate scope of *Auer* deference should be affirmed.

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[9] After notice and comment rulemaking in 2004, DOL revised its salary basis test regulation to specifically reject the litigation position it had taken in *Auer* that a "significant likelihood" of an improper salary deductions precluded exemption, stating: "Moreover, nothing in *Auer* prohibits the Department from making changes to the salary basis regulations after appropriate notice and comment rulemaking." 2004 Final Rule, 69 Fed. Reg. at 22180.

B. The Distinction Between An Agency's Interpretation of Regulatory Language and Statutory Language Is Critical To Avoid Subverting Formal Rulemaking Requirements

The Second Circuit's rubber-stamping of DOL's new "transfer of title" requirement illustrates the express need for guidance on the limitations on *Auer* deference. Relying solely on DOL's interpretation, the Second Circuit turned an entire industry on its head, subjecting it to vast potential liability and casting doubt on the exempt status of over 90,000 employees. Given the enormity of these possible ramifications, DOL's attempt to regulate outside of the constraints of the Administrative Procedures Act deserves careful scrutiny. While deference to an agency's interpretations may be appropriate in some circumstances, clear bounds need to be set to ensure that critical regulatory changes are not permitted to occur absent notice-and-comment procedures.

Courts should be required to affirmatively determine whether an agency's interpretation proffered through informal means is truly that – an "interpretation" of existing regulations – or an attempt to sidestep formal processes. As noted by the Ninth

Circuit, because DOL's regulations did not otherwise set forth a particular test for "sale", "the Secretary [of Labor] has used her appearance as *amicus* to draft a new interpretation of the FLSA's language." *SmithKline Beecham Corp.*, 635 F.3d at 395. This attempt to bypass rulemaking and notice procedures appropriately troubled the court.

Put simply, efforts by agencies to informally interpret *statutory* language – thereby creating new regulatory requirements – should not be allowed. *See N. Cal. River Watch v. Wilcox*, 620 F.3d 1075, 1088 (9th Cir. 2010) (declining to extend *Auer* deference where the amicus brief submitted by the agency purported to interpret statutory, not regulatory, language). This is particularly true when an agency's new position will have a detrimental sweeping effect across any entire industry. *See Doe v. Mutual of Omaha Insurance Co.*, 179 F.3d 557, 561, 563 (7th Cir. 1999) (an agency's attempts to advance "radically expansive" and "far-reaching" interpretations of its regulations which impacts an entire industry should not be permitted and courts are "justif[ied] . . . in requiring the Department to invite deference by a more deliberative, public, and systematic procedure than the filing of an amicus brief.").

APA procedures guarantee that the regulated community is put on notice of proposed new regulations and changes to existing regulations. Equally important, the regulated community is given the opportunity to provide the agency with the benefit of its hands-on knowledge regarding how the regulatory changes will impact them. *See* 5 U.S.C. § 551, *et seq.* Any burden imposed by the APA process is off-set by ensuring that the public is not surprised and unprepared by new regulatory requirements.

By unilaterally imposing its new "transfer of title" requirement through *amicus* briefing, DOL gave the public neither notice nor the chance to comment. Moreover, by evading the formal APA rulemaking procedures, DOL also failed to assess the potential negative impact its new interpretation of "sales" may have on small business, as conducting such an analysis is required as part of the APA notice procedures under the Regulatory Flexibility Act. *See* 5 U.S.C. § 601, *et seq.*

If the Secretary of Labor wishes to revise the scope of 29 C.F.R. § 541.501(b), she can issue a notice of proposed rulemaking – just as she has done many times, including her recent proposed regulations to eliminate the FLSA exemption for most home care workers. However, on the issue here, she has not done so. DOL should not be permitted to push new regulatory requirements through the back door of an *amicus* brief.

III. ALLOWING AGENCIES TO REGULATE THROUGH *AMICUS* WILL HAVE A DEVISTATING IMPACT ON SMALL BUSINESSES

The Second Circuit's adoption of DOL's position failed to take into consideration the damaging ramifications associated with permitting an agency to issue regulations through *amicus* filings. Businesses today – particularly small businesses – already face significant hurdles complying with regulatory requirements. Permitting agencies such as DOL to announce new policies through obscure methods, such as *amicus* filings, would have a devastating impact on industries.

The Administrative Procedure Act notice and comment rulemaking process gives businesses notice of changes to regulations which may impact whether employees may be classified as non-exempt from FLSA overtime requirements in the future. It does not create back wage liability retroactively for a position an entire industry was previously treating as exempt. The most damaging aspect of announcing new regulations through court filings is the massive retroactive liability that can be created. In deferring to DOL's new and rigid definition of what constitutes "sales", the Second Circuit opened the flood gate of litigation, subjecting one industry to potentially billions of dollars of liability.

DOL's new "transfer of title" requirement is not limited in application to the pharmaceutical industry, but instead impacts every business which employs individuals in outside sales positions. Employers with outside sales employees – assuming they are aware of DOL's various *amicus* briefs on this issue – are faced with the daunting task of immediate restructuring of their businesses. Moreover, companies are rendered virtually defenseless to claims for overtime – subjecting them to possible payment equivalent of up to *six years* of overtime payments for each employee.[10] Should this Court decline to affirm the Ninth Circuit's holding, and instead grant deference to DOL's litigation position, we can expect untold amounts of litigation and surprise liability to follow.

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[10] Damages under the FLSA include recovery of unpaid wages for two years – three years for willful violations – and an equal amount of liquated damages. *See* 29 U.S.C. § 216(b).

A. Small Businesses Face Enormous Difficulties Even Learning About DOL's New "Transfer of Title" Requirement

Most small businesses do not have in-house legal counsel or human resource professionals. Thus, requiring such businesses to take notice of new positions set forth by the DOL through its participation as *amicus curiae* is unduly burdensome.

DOL publishes some, but clearly not all, of its court briefs on an obscure page on its internet site, sending out an email regarding the posting to a listserv. But for small businesses, without human resources professionals or employment lawyers on call who have signed up for the listserv (or regularly visit http://www.dol.gov/sol/media/briefs/main.htm), these methods of publication of new regulatory requirements are woefully insufficient to put small business owners on notice of the changes.

Most regulated businesses wish to comply with the FLSA. However, if an agency does not provide fair and reasonable notice of requirements, small businesses will face vast difficulties with compliance. This is exactly the opposite effect Congress intended when requiring that regulations under the FLSA be made pursuant to APA procedures. *Cf. Singh v. City of New York*, 524 F.3d 361, 369-70 (2d Cir. 2008) (noting that the "wide-ranging impact" on businesses was a relevant factor in rejecting plaintiffs' proffered interpretation of the Portal-to-Portal Act, where such interpretation would "suddenly impos[e] upon businesses across the country a liability to compensate employees" that no court had imposed in 60 years).

B. Regulation By Amicus Brief Creates Unfair Surprise and Upsets Long-Standing Expectations

Since the FLSA was enacted over 70 years ago, pharmaceutical sales representatives have always been treated as exempt from overtime requirements by the Department of Labor and the majority of reviewing courts.[11] By informally announcing its new "transfer of title" requirement in 2009, DOL imposed retroactive liability, without giving employers any time to reclassify sales representatives going forward before facing liability. In stark contrast, DOL gave the regulated community four months to examine its pay practices and make any necessary changes before the 2004 Final Rules came into effect. 2004 Final Rule, 69 Fed. Reg. at 22122 (Final Rule published on April 23, 2004, but were not effective until August 23, 2004).

DOL's *amicus* brief here results in exactly the "unfair surprise" raised by the Court in *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158 (2007) as a concern to the deference owed to informal agency interpretations. *Id.* at 170 (the Court held that deference to such agency interpretations would be appropriate only "as long as interpretative changes create no unfair surprise"). While the Court held deference was owed to DOL's interpretation in *Coke* because it was announced in a notice-and-comment *rulemaking procedure, it raised the issue of affording* deference if such notice is not made. *See id* at 170-71; *see also Caruso v. Blockbuster-Sony Music Entm't Ctr.*, 193 F.3d 730, 737 (3d Cir. 1999) ("An agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning") (citation omitted).

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[11] DOL and courts have reached this conclusion not only relying on the outside sales exemption, but also on other exemptions – such as the administrative and highly-compensated employee exemptions – not at issue in the underlying case. For example, in 1945 DOL issued an opinion letter opining that "medical detailists" employed by a pharmaceutical company, whose work was "aimed at increasing the use of [the company's] product in hospitals and through physician recommendations", qualified for the administrative exemption under the FLSA. DOL Opinion Letter, May 19, 1945, 2 Lab. L. Rep. (CCH) P 33,093. This opinion has never been repudiated and, until issuing its *amicus* brief to the Second Circuit in 2009, DOL has never disagreed that sales representatives in the pharmaceutical industry are exempt employees.

Here, not only has DOL declined to issue proposed rulemaking with regards to its new "transfer of title" requirement, but it wholly failed to give *any* prior indication of this change. In particular, DOL has never brought an enforcement action concerning PSRs, and has never issued an opinion letter challenging the pharmaceutical industry's treatment of these employees.[12] DOL had ample opportunity to revise its interpretation of what constitutes a "sale" in 2004 when it revisited the white collar exemptions. It chose not to do so – instead reinforcing the long-held position that an outside sales employee is one who "in some sense" makes a sale.

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[12] Opinion letters issued by the Wage & Hour Administrator give employers at least some time to adjust to a newly announced policy — as DOL has an internal policy never to issue an Opinion Letter to parties to pending litigation. Much to the frustration of employers around the country, in 2010, DOL announced that it would no longer be issuing opinion letters responding to questions individually raised by employers. Instead, DOL stated its intention to issue "Administrator's Interpretations" that address general legal requirements (DOL has issued only three AIs). In short, DOL will not tell an employer whether a job is properly classified as exempt *before* a lawsuit is filed, but will file *amicus* briefs after litigation begins, creating retroactive liability for employers.

The pharmaceutical industry, at the very least, was surprised by DOL's new regulatory requirement – especially Novartis, which recently paid $99 million to 7,000 PSRs in order to resolve the Second Circuit case.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

FLSA Exemptions

1. 29 U.S.C. § 203(e)(3) (individuals employed in agriculture by their parents).
2. 29 U.S.C. § 203(e)(4) (individuals who volunteer to perform services for public agencies).
3. 29 U.S.C. § 203(m) (partial exemption for tipped employees).
4. 29 U.S.C. § 206(g) (partial exemption for employees under age 20 during their first 90 days of employment)
5. 29 U.S.C. § 207(i) (commissioned employees in retail and service establishments);
6. 29 U.S.C. § 207(j) (partial exemption for employees of establishments engaged in care of sick, aged or mentally ill).
7. 29 U.S.C. § 207(k) (partial exemption for fire protection and law enforcement employees).
8. 29 U.S.C. § 207(m) (partial exemption for employees stripping, grading, handling, stemming, re-drying, packing or storing tobacco).
9. 29 U.S.C. § 207(n) (partial exemption for rail, trolley and bus drivers engaged in charter activities).
10. 29 U.S.C. § 207(q) (partial exemption for employees receiving remedial education).
11. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide executive capacity).

12. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide administrative capacity).

13. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide professional capacity).

14. 29 U.S.C. § 213(a)(1) (minimum wage and overtime exemption for employees employed in a bona fide outside sales capacity).

15. 29 U.S.C. § 213(a)(3) (minimum wage and overtime exemption for employees of seasonable amusement or recreational establishments).

16. 29 U.S.C. § 213(a)(5) (minimum wage and overtime exemption for employees catching, harvesting, cultivating or farming fish, shellfish, crustacia, sponges, seaweeds, or other aquatic forms of animal and vegetable life).

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AMICUS
CURIAE
BRIEF

No. 11-204

IN THE

Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER, *et al.*,

Petitioners,

v.

SMITHKLINE BEECHAM CORPORATION
dba GLAZOSMITHKLINE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PHARMACEUTICAL REPRESENTATIVES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Eugene Kuzinski ("Kuzinski") is a former pharmaceutical sales representative ("PSR" or "detailer") of Schering Corporation, and is a named plaintiff in *Kuzinski et al. v. Schering Corp.*, Civil Action No. 07-cv-233 (D. Conn.), a Fair Labor Standards Act of 1938 ("FLSA") overtime action pending in the United States District Court for the District of Connecticut.[2] Kuzinski worked in the pharmaceutical industry as a PSR from 1973 until 2006. Dana Higgs ("Higgs") is a former PSR for Pfizer, Inc., and is a named plaintiff in *Coultrip et al. v. Pfizer, Inc.*, 06-cv-9952 (S.D.N.Y.), a wage and hour action pending in the United States District Court for the Southern District of New York. Higgs worked as a PSR for Pfizer from 1984 until 2006. Dede Evavold ("Evavold") is former PSR for Sanofi and is the named plaintiff in a FLSA action pending in the United States District Court for the District of New Jersey, *Evavold v. Sanofi-Aventis, U.S. LLC et al.*, 09-cv5529 (D.N.J.). Evavold worked in the pharmaceutical industry as a PSR from 2003 to 2008.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici*, or its counsel, made a monetary contribution intended to fund its preparation or submission. The Petitioners have filed a blanket waiver with the Court consenting to the submission of all *amicus* briefs. The consent of the Respondent is submitted herewith.

[2] *Kuzinski v. Schering Corp*, 604 F. Supp. 2d 385 (D. Conn. 2009), *aff'd*, 384 F. App'x 17 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1567 (2011).

II. SUMMARY OF THE ARGUMENT

Amici submit this brief in support of the appeal of Petitioners — Michael Shane Christopher and Frank Buchanan, who were formerly employed as PSRs by respondent, GlaxoSmithKline ("GSK") — to address the change in the job duties and responsibilities of PSRs during the past century. This change is materially relevant to the decision below in *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383 (9th Cir. 2011), *cert. granted*, 132 S.Ct. 760 (2011). The Ninth Circuit determined that the Petitioner-PSRs are exempt from overtime pay under the FLSA's outside salesman exemption, and declined to grant deference to the interpretation of the Secretary of Labor that the outside sales exemption does not apply to PSRs. In reaching this result, the Ninth Circuit assumed that the job duties of a PSR have not changed since the 1930s; that PSRs generally have been considered "salespeople" since 1938; that "the conventional wisdom [is] that detailing" is the "functional equivalent" of making a sale in the pharmaceutical industry; and that until recently the Secretary has "not challenge[d]" that view. *Id.* at 387-88, 396, 399.

Because of external and internal regulation of the pharmaceutical industry, the job duties of a PSR, and the manner in which pharmaceutical prescription drugs are sold by the pharmaceutical industry, have changed dramatically since the 1938 enactment of the FLSA. The PSR *amici* submitting this brief have 60 years of combined detailing experience. Drawing on that decades-deep reservoir of knowledge, they refute two fundamental rationales of the Ninth Circuit's holding: that a) the job duties of a pharmaceutical detailer have remained static over time; and b) the pharmaceutical industry accordingly has been unfairly surprised by the Secretary of Labor's *amicus curiae* position that PSRs are not exempt under the FLSA as outside salesmen.

In reality, numerous Acts of Congress[3] and regulations have significantly changed the duties and responsibilities of PSR's. The Secretary's *amici* briefs analyzed these changed duties, not the PSRs of long ago. Based on the primary duty of contemporary PSRs, the Secretary properly concluded that PSRs are not exempt outside salesmen.

In addition, the pharmaceutical industry itself has established self-imposed regulations that have substantially altered the duties and responsibilities of PSRs. The Pharmaceutical Manufacturers Association was founded in 1958 — now known as Pharmaceutical Research and Manufacturers of America ("PhRMA")[4]— consists of a consortium of pharmaceutical companies,[5] including respondent Respondent SmithKline Beecham Corp. ("GSK"), and it has established a strict code governing interactions between PSRs and healthcare professionals with which its members must abide. PhRMA has issued numerous reports and articles about pharmaceutical marketing and promotion, in which it classifies the role of PSRs as marketing and promotion. Critically, PhRMA does *not* characterize the interaction between PSRs and healthcare professionals as one involving "sales."

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[3] *See* The Federal Food, Drug and Cosmetic Act ("FDCA") of 1938 (amended 1994); the Durham-Humphrey Amendment of 1951 (codified as amended at 21 U.S.C. § 353 (2004)); the Kefauver-Harris Amendments of 1962 (codified as amended at 21 U.S.C. § § 321, 331-32, 348, 351-53, 355, 357-60, 372, 274, 376, 381 (1970)); and the False Claims Act (codified as amended 31 U.S.C. § 3729 (1986)).

[4] *See* www.pharma.org/about/phrma

[5] *See* www.pharma.org/about/principles-guidelines/code-interactions-healthcare-professionals. The signatory members of PhRMA that have announced they intend to abide by the Code are as follows: Abbott; Allergan, Inc.; Amgen Inc.; Amylin Pharmaceuticals, Inc.; Astellas US LLC; AstraZeneca LP; Bayer HealthCare Pharmaceuticals; Biogen Idec; Boehringer Ingelheim

These dramatic changes in the duties of a PSR and the manner in which pharmaceutical drugs are sold over the past century are relevant to the Ninth Circuit's conclusion that, until recently, the DOL has long acquiesced in the practice of the pharmaceutical industry to consider detailers to be salespeople.

Pharmaceuticals, Inc.; Bristol-Myers Squibb Company; Celgene Corporation; Caphalon, Inc.; Covidien; Cubist Pharmaceuticals, Inc.; Cumberland Pharmaceuticals Inc.; CV Therapeutics, Inc., Daiichi Sankyo, Inc., Eisai Inc.; EMD Sorono; Endo Pharmaceuticals Inc.; Enzon Pharmaceuticals, Inc.; Forest Laboratories, Inc.; Genzyme Corporation; GlaxoSmithKline; Hoffman-LaRoche Inc.; Johnson & Johnson; Eli Lilly and Company; Lundbeck Inc.; Merck & Co, Inc.; Millennium Pharmaceuticals, Inc.; Novartis Pharmaceuticals Corporation; Novo Nordisk Inc.; OSI Pharmaceuticals; Otsuka America, Inc.; Pfizer Inc; Procter & Gamble Pharmaceuticals; Purdue Pharma L.P.; Regeneron Pharmaceuticals, Inc.; sanofi-aventis U.S.; Schering-Plough Corporation; Sepracor Inc.; Shire Pharmaceuticals, Inc.; Sigma-Tau Pharmaceuticals, Inc.; Solstice Neurosciences, Inc.; Solvay Pharmaceuticals, Inc.; Takeda Pharmaceuticals North America, Inc.; Talecris Biotherapeutics; and Wyeth.

III. ARGUMENT

A. The Job Duties of a PSR Have Changed Materially Over the Past Century

The Ninth Circuit panel gave "no deference" to the DOL's interpretation in the agency's *amicus* brief below that PSRs are not exempt outside salespersons. The lower court justified its decision not to grant deference based in part on the following reasons:

(a) The job of "detailing" has changed little over the last 60 years. *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 383, 387 (9th Cir. 2011);

(b) The outside sales exemption has existed since 1938 and "[PSRs] have generally been considered salespeople" (*Id.* at 399); and

(c) Given points (a) and (b) above, the DOL has historically accepted the "conventional wisdom" that detailing is the functional equivalent of selling pharmaceutical products –until, suddenly, the agency changed course in its *amicus* briefs in the *Novartis*[6] appeal and this appeal. *Id.*

The brief of the Respondent in support of the *certiorari* petition, and the *amicus curiae* briefs of the Chamber of Commerce of the United States of America and the Pharmaceutical Research and Manufacturers of America in support of the Respondent, likewise suggest, imply, or argue that the job duties of PSRs have changed little over time, that for over 70 years PSRs been considered exempt by the industry based on those job duties, and that to hold otherwise would unfairly upset this settled understanding. 2011 WL 5007892, at **i, 2, 24-29; 2011 WL 4941011, at *5; 2011 WL 5007893, at **2, 6, 19, 21, 23-24.

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[6] *In re Novartis Wage and Hour Litigation*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011).

1. The PSR of Long Ago

a. The PSR's Job Duties and Responsibilities

Contrary to the beliefs of the Ninth Circuit in *Christopher* and the Respondent and its *amici*, the job duties and responsibilities of modern PSRs differ materially from those of the pharmaceutical detailers of the distant past. These facts are relevant to — and substantially undermine — the *Christopher* panel's belief that PSRs have always done the same work since the FLSA's enactment and that therefore the DOL's *amicus* position that PSRs do not make sales for purposes of the outside salesman exemption is somehow an unfair surprise to the industry and an abrupt and improper change.

Notably, both prior to the FLSA's 1938 enactment and for several decades following its enactment, the job duties of PSRs included not only promotional work but also the actual selling of pharmaceutical products — specifically, the soliciting and taking of purchase orders for such products. *See* George R. Cain, *The Detail Man – What the Pharmaceutical Industry Expects of Him*, 38 Bull. N.Y. Acad. Med., No. 2, Feb. 1962, at 129 (noting that "[m]ost [PSRs] have . . . also a 'sales assignment' where they call upon buying accounts such as drugstores and hospitals"); *available at* http://www.ncbi.nlm.nih.gov/

pmc/articles/PMC1804767/?page=4; *id.* at 131 ("Many years ago the pharmaceutical sales representative sold many 'competitive' products to the pharmacist who could then compound prescriptions written by the doctor. Today most prescriptions are for products that have already been compounded by the manufacturer. Thus the role of the detail man has changed to a considerable extent from 'competitive product' selling in the drug store to detailing the physician on the specialties of his company."); Arthur F. Peterson, *Pharmaceutical Selling, "Detailing" and Sales Training*, at 33, 83, 132, 139-40, 157, 166-69, 181, 188-89, 241-44 (2nd ed. Heathcote-Woodbridge, Inc. 1959) (PSR's job duties included soliciting and taking actual orders for prescription drugs from physicians, wholesale druggists, retail pharmacies, and physician supply houses, taking inventories of drug retailers' stock, discussing pricing, and carrying and filling out order forms), *available at* http://babel.hathitrust.org/cgi/pt?u=1&num=0&seq=23&view=image&size=100&id=uc1.%24b332738; Tom Jones, *Detailing the Physician, Sales Promotion by Personal Contact with the Medical and Allied Professions*, at 158-64 (New York, Romaine Pierson Publishers, Inc. 1940) (PSRs performed both detailing and selling duties and part of their duties included taking of orders from physicians), *available at* http://babel.hathitrust.org/cgi/pt?id=mdp.39015072276374; *see also* Rufus L. McQuillan, *Is the Doctor In? The Story of a Drug Detail Man's Fifty Years of Public Relations with Doctors and Druggists*, at 37 (Exposition Press, New York, 1963) (noting that *some* PSRs could be "a good detail man in their work with doctors, and yet poor in selling to drugstores and hospitals. And, of course, the reverse was true – good as a salesman but poor as a detail man"), *available at* http://babel.hathitrust.org/cgi/pt?id=mdp.39015072117149.

The fact that PSRs of long ago — contrary to modern PSRs — actually sold drugs is further confirmed by case law. *See, e.g.*, *Seymour v. Parke, Davis & Co.*, 423 F.2d 584, 587 (1st Cir. 1970) (salesmen for drug company Parke, Davis & Co. (which later became subsidiary of Pfizer, Inc.) visit physicians, hospitals and retail pharmacies to disseminate product information and to solicit and take orders, which are forwarded to Massachusetts office for acceptance and filling from warehouse); *Adams v. Upjohn Co.*, 142 Ga. App. 264, 264, 235 S.E.2d 584, 584 (Ga. Ct. App. 1977) (sales representative employed by pharmaceutical company, whose job duties included disseminating information to physicians and hospitals, was authorized to request and receive orders for products in hospitals); *State ex rel. Ciba Pharmaceutical Products, Inc. v. State Tax Commission*, 382 S.W.2d 645, 648 (Mo. 1964) (professional service representatives employed by Ciba Pharmaceutical Products, Inc. (which later became part of Novartis) not only called upon physicians, but also solicited orders for drugs from retail druggists and hospital pharmacies, and filled out orders and sent them to home office for approval); *Zirin v. Charles Pfizer & Co.*, 121 So.2d 694, 697 (Fla. Dist. App. 1960) (activities of Pfizer, Inc. detail men included not only calling on doctors to persuade them to prescribe company's products, but also soliciting and receiving orders from retailers for products, relaying orders to local wholesalers for execution, and forwarding substantial number of orders to regional or home office), *aff'd*, 128 So.2d 594 (1961); *Parke, Davis & Co. v. Fifth Judicial Dist. Ct. in and for Beaver County*, 93 Utah 217, 72 P.2d 466, 466 (1937) (traveling salesman for Parke, Davis & Co. solicited and took orders from purchasers which he forwarded to company's branch office for acceptance); *Smith Co. v. American Pharma. Co.*, 270 N.Y. 184, 187 (1936) (noting that defendant pharmaceutical company's salesman in 278 visits to drug stores delivered in forty-two instances company's products to druggist).

Moreover, in contrast to today's PSRs who do not receive commissions, the PSRs of long ago received commissions for sales that they made, *see* Peterson, *Pharmaceutical Selling*, at 119, 184, 198 — an important factor indicating that they actually sold pharmaceutical products.

Thus, unlike the pharmaceutical detailers of today who merely promote drugs, earlier medical detailers performed job duties that arguably could be classified as exempt under the FLSA's outside salesman exemption. Thus, it is not surprising that, until recently, the DOL had not rendered an interpretation that affirmatively and expressly stated that PSRs are not exempt as outside salesmen because they perform purely promotional work.[7]

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[7] It is also not surprising that the DOL did not until recently articulate a position on whether PSRs are exempt outside salesmen because no pharmaceutical company has ever requested an interpretation on that issue from DOL, despite the risk of being held to have acted in reckless disregard of the law or less than good faith for FLSA liability purposes in the absence of such a request. *See* 29 U.S.C. § 259(a) (reliance on written administrative interpretation by DOL suffices to show good faith by employer); 29 C.F.R. §§ 790.14, 790.15, 790.17; *Frank v. McQuigg*, 950 F.2d 590, 599 (9th Cir. 1991) ("The regulations and relevant precedent also indicate that any duty of inquiry owed by the employer is satisfied by an inquiry *to the Administrator*.") (emphasis in original) (citing authorities); *Brock v. Superior Care*, 840 F.2d 1054, 1062 (2d Cir. 1988) ("Failure to obtain a [DOL] ruling, even when one has not been suggested, has resulted in a determination of willful violation under the reckless disregard standard") (citation omitted).

b. Educational and Job Requirements of Earlier PSRs

The background and job requirements of PSRs of the past were also fundamentally different. They reflected an aptitude and a level of sophistication necessary for the ability to work with physicians *and* the retail pharmacy industry in an environment that had only recently begun to experience tightening oversight by the federal government and the requirement of written prescriptions of physicians for most types of drugs. In this regard, a PSR was "a scientifically trained graduate in pharmacy, pharmaceutical chemistry, pharmacology, or biology. He usually ha[d] a bachelor of science or higher degree. He [wa]s well versed in chemistry, bacteriology, physiology, and pharmacology and obviously th[ought] as a scientist." Peterson, *Pharmaceutical Selling*, at 26. Indeed, individuals who were not pharmacy college graduates were discouraged from seeking a detailer position, because they would be at a competitive disadvantage with those who had trained in pharmaceutical sciences and "who are thus ideally suited" to work as PSRs. *Id.* at 33. In addition, PSRs of the past needed to read current literature on pharmacology and therapeutics and to study the relevant scientific material. To "enable [the PSR] to utilize fully and to the greatest advantage in his work, [he or she] require[d] the scientific training afforded in the 5- or 6-year pharmaceutical course baccalaureate or higher degree." *Id.* at 2-3, 26-27, 31-32.

In contrast, the educational background considered acceptable for today's PSR is simply a college degree. *See* Benjamin Falit, *The Path to Cheaper and Safer Drugs; Revamping the Pharmaceutical Industry in*

Light of GlaxoSmithKline's Settlement, 33 J.L. Med. & Ethics 174, 176 (2005) ("Typically, pharmaceutical sales representatives are college graduates who spend approximately six to eight weeks in training before entering the field.").

2. Modern Era PSRs

Unlike the PSR of long ago, PSRs of today "do not 'sell' prescription drugs, but they do encourage health professionals to utilize pharmaceutical products when treating patients." Lars Noah, Esq., *Death of a Salesman: To What Extent Can the FDA Regulate the Promotional Statements of Pharmaceutical Sales Representatives*, 47 Food & Drug L.J. 309, 310 (1992). As described below by modern day PSRs, the job of a PSR today is materially different from that of the PSR of long ago.

a. Dana Higgs

Higgs worked for Pfizer from 1984 to 2006. During her tenure with Pfizer, she witnessed the evolution of the PSR position. *See* Supplemental Declaration of Higgs, document No. 94-19 and submitted in the *Pfizer* action on May 7, 2008, at ¶ 8 (describing how when she first started with Pfizer in 1984, PSRs "had direct accounts with pharmacies and physicians and sales were tracked by pharmacy and direct account orders. However, over the years, the tracking of 'sales' changed, as pharmaceutical reps stopped selling directly to physicians or taking orders from pharmacies. Pharmaceutical reps at Pfizer have *not* had any direct accounts with physicians or pharmacies for well over ten years...Reps stopped selling products to pharmacies and physicians with direct accounts over ten years ago.") *See also* transcript from the June 15, 2007 deposition of Dana Higgs, at 214:10-215:16. Higgs testified: "When we first started the job, pharmacists used to purchase products directly from us. And it's changed over the years. Now, they only buy through wholesalers. And we can't take direct orders from pharmacists." *See id.* at 262:2-8.

At her deposition in the Pfizer action, Higgs also noted that the job qualifications for PSRs had changed radically – no longer were most PSRs scientifically trained – and that PSRs' primary duty when they made detailing visits to doctors was to announce a memorized script prepared by the drug company:

> When I first started, I was one of the few reps that weren't pharmacists. There were a lot of reps who were pharmacists. And I had a business degree. Now, the reps don't have business degrees, don't have pharmacy degrees. Most of them, you know, they can have anything. They can have a degree in physical education and the doctors don't feel, in general, rely upon the expertise of a drug rep. We aren't considered someone that they value for information so much, you know, because the way that we present is not the way we used to before…
>
> But it's not that way anymore. Now its, this is the paragraph you're going to read. You're going to go in and your going to tell him this paragraph. And it's going to be the same paragraph the rep before you read, and the

rep before him. (See also Higgs Depo. Tr. 156, Lines 4-24, where Ms. Higgs relates that Pfizer PSRs were instructed how to hold their pens when pointing to promotional materials and to recite a "memorized presentation" to doctors. (*Id* at p. 161:11)).

b. Eugene Kuzinski

The testimony Kuzinski provided in the *Schering* action is consistent with that of Higgs in that he described the evolution of the duties of a PSR. *See* Reply Declaration of Kuzinski submitted in the *Schering* action on March 4, 2011, at ¶ 6 ("When I started as a pharmaceutical representative for Cooper Laboratories in 1973, unlike my tenure with Schering, I had the authority to do my own research to find clinical studies to use on calls with physicians. I could make my own visual aids, and I could decide which doctors to call on and how often. I also worked for Fleming & Co. from 1976-1980, and I had the authority to call on any doctor I wanted. I could even call on doctors in different states.") Kuzinksi further provided that when he worked for Key Pharmaceuticals, prior to working for Schering, he actually sold products to pharmacies. *See* Declaration of Kuzinski submitted in the *Schering* action on June 16, 2008 (Doc No. 194-2) at ¶ 4.

The testimony of these PSRs reflects the material change in job duties that occurred in the last century. Whereas PSRs of the past could actually sell drugs to purchasers and their focus concentrated on pharmacies, the PSR of today cannot sell any drugs but may only promote them, and physicians are the primary focus of these promotional efforts.

B. Legislative and Regulatory Actions Compelled Changes in PSRs' Job Duties

During the last century, the duties of a PSR materially changed in at least two respects: (1) a PSR could no longer actually sell drugs, but could only promote pharmaceutical drugs, and (2) PSRs no longer targeted wholesalers or retail pharmacies but strictly focused on physicians. This change in the PSR's duties resulted from the fact that the pharmaceutical industry and the manner in which it did business changed dramatically during the twentieth century as a result of laws enacted by the federal government.

In the late 1800's, there were few restrictions on drugs. Katherine A. Helm, *Protecting Public Health From Outside The Physician's Office: A Century of FDA Regulation From Drug Safety Labeling to Off-Label Drug Promotion,* 18 Fordham Intell. Prop Media and Ent. L.J. 117, 125 (2007). Drugs were branded as cure-alls, snake oils and elixirs that claimed to relieve all ailments. *Id.*

Prior to the 1900s, the public could obtain medications without a prescription. Nancy L. Shore, Note, *Advanced Nursing Practice and Prescriptive Authority: A Victory for New Jersey Nurses*, 17 Seton Hall Legis. J. 576, 587 (1993). Not until the early 1900s did physicians become responsible for drug prescription. *Id.* Subsequently, the Pure Food and Drug Act of 1906 limited the authority to prescribe narcotic drugs only to physicians, yet all other drugs were free to be purchased without a prescription. *Id.* That act prohibited interstate commerce in 'adulterated' or 'misbranded' drugs," Helm, 18 Fordham Intell. Prop Media and Ent. L.J. at 125, but there was no distinction made between prescription and proprietary, or over-the-counter, drug products under the 1906 Act, *id.* The original act remained viable for thirty-two years. Shore, 17 Seton Hall. Legis. J. at 587.

Moreover, as late as the mid-1920s, more than 80 percent of prescriptions required "compounding" by a pharmacist while two decades later, only about a quarter required such work. Jennifer E. Spreng, *Pharmacists and the "Duty" to Dispense Emergency Contraceptives*, 23 Issues L. & Med. 215, 230 (2008). "Indeed, up until the dawn of modern pharmaceutical manufacturing in the 1950s, the majority of prescriptions were still compounded [by pharmacies]." Jesse M. Boodoo, Note and Comment, *Compounding Problems and Compounding Confusion: Federal Regulation of Compounded Drug Products and the FDAMA Circuit Split*, 36, Am. J.L. & Med. 220, 222 (2010). "The number of compounded prescriptions dropped precipitously in the 1950s and 1960s, as mass pharmaceutical production supplanted labor-intensive compounding. *Id.*

In the 1930s, drug companies did not advertise to doctors because any non-narcotic drug could be purchased without a prescription before 1938. Peter Temin, *The Evolution of the Modern Pharmaceutical Industry*, Working Paper of Department of Economics, Massachusetts Institute of Technology, No. 223, at 2 (1978), *available at* http://dspace.mit.edu/bitstream/handle/1721.1/63589/evolutionofmoder00temi.pdf?sequence=1. In addition, the range of products sold in the 1930s was extremely limited. *See id.* ("You could count the basic medicines on the fingers of your two hands.") (quoting president of Merck); *see also id.* 3 ("Most of our products were sold without a prescription" and "43 percent of the prescription medicines were compounded by the pharmacist") (quoting president of Merck). During the 1930s, there were only a small number of basic medicines, and many of these were compounded by pharmacists and sold without prescriptions. Noah, *Death of a Salesman*, 47 Food & Drug L.J. at 311. Marketing efforts by PSRs therefore focused almost exclusively on retail pharmacies. *Id.*

Into the 1930s, moreover, dangerous drugs were still sold legally, because safety testing was not required before marketing. *The Pharmaceutical Century, Ten Decades of Drug Discovery* (ACS Publications), *available at* http://www2.uah.es/farmamol/The%20Pharmaceutical%20Century/Ch2.html. Pharmaceutical companies still manufactured many 19th and early 20th century drugs that were sold in bulk to pharmacists, who then compounded them into physicians' prescriptions. *Id.*

Also, newer drugs, such as many biological and sulfa drugs (after 1935), were packaged for sale directly to consumers and seemed to represent the future of drug manufacturing. *Id.*.

This led to the next major change in U.S. drug regulation, which occurred after a healthcare crisis in 1937. Helm, 18 Fordham Intell. Prop Media and Ent. L.J. at 126. In that year, many children died after ingesting a liquid formulation of a publicly distributed drug that had been tested for flavor, but not safety, before marketing. *Id.* The public outcry galvanized Congress to action — a disaster-based call repeated in the context of drug regulation a number of times over the following years. *Id.* Congress recognized that the United States Food and Drug Administration's ("FDA's") authoritative reach needed to extend beyond labeling standards. *Id.* "It needed to provide a substantive pre-marketing review of drugs." Id. Shortly thereafter, the Federal Food, Drug and Cosmetic Act of 1938 ("FDCA") was enacted. *Id.* at 126-27. It required for the first time that drugs be proved "safe" and that manufacturers submit New Drug Applications before marketing. *Id.* at 127. Under the FDCA, the FDA tightly controlled all aspects of drug marketing, mandating that the drug product be labeled with extensive safety warnings and directions for use. *Id.*

Drug manufacturers initially retained discretion over the classification of drugs as prescription or non-prescription. *Id.* But a 1945 amendment to the drug labeling regulations initially defined the types of drugs that would require a physician prescription. Shore, 17 Seton Hall. Legis. J. at 587. And in 1951, after several episodes of consumer misuse, the Durham-Humphrey Amendment created a distinct separation of prescription drugs and over-the-counter drugs. *Id*; Helm, 18 Fordham Intell. Prop Media and Ent. L.J. at 127. This amendment distinguished between drugs that could be marketed with adequate directions for use by laymen and those that were not considered safe for untrained use even with directions. The former class of drugs was categorized as non-prescription drugs that could be dispensed over-the-counter, while the latter were categorized as prescription drugs that could only be dispensed by a prescription licensed medical practitioner. *See id.* at 127-28 (citing the Durham-Humphrey Amendment of 1951 (codified as amended at 21 U.S.C. § 353 (2004)). Accordingly, the public's reliance on physician pharmaceutical expertise grew. Shore, 17 Seton Hall. Legis. J. at 587.

The FDCA created a new healthcare landscape and, effectively, architected the FDA's role as guardian of public safety in the drug industry. Helm, 18 Fordham Intell. Prop Media and Ent. L.J. at 128. The FDCA also encouraged physician dependence, by establishing new privileges for licensed physicians to become the arbiters of the FDA's growing system of regulations for prescription drugs. *Id.* As a result, the medical profession enjoyed an institutionalized and legitimized increase in status throughout the 1950's, when patients relied heavily on their physicians to determine the proper treatments. *Id.*

Before the enactment of the FDCA, all nonnarcotic drugs were available without a prescription from a pharmacist and, as a result, consumers chose their own drugs on the basis of self-diagnosis, drug advertisements or labels. Susan Kopp Keyack, Note, *The Drug Price Competition and Patent Term Restoration Act of 1984: Is it a Healthy Long Term Solution?*, 21 Rutgers L.J. 147, 151 (1989). Thus, one major effect of the FDCA and its amendments was to create a distinction between prescription and over-the-counter drugs. *Id.* Another major effect was increased FDA control, whereby the FDA dictated which drugs could be placed on the market, and individual discretion shifted from consumers to prescribing physicians. *Id.* With the emergence of prescription drugs, a new and prosperous drug industry evolved "characterized by large firms selling new, patented drugs . . . ." *Id.*

"These regulatory changes had a profound effect on the practice of pharmacy." Jennifer E. Spreng, Pharmacists and the "Duty" to Dispense Emergency Contraceptives, 23 Issues L. & Med. 215, 230 (2008) "[I]n the wake of 'prescription-only' regulations, the 'product,' not the 'process,' became central to pharmacy practice, and the pharmacist's role evolved from compounder to society's prescription drug distributors. *Id.*

As the modern drug industry came into being after World War II, pharmaceutical companies began promoting their products directly to prescribers. Noah, *Death of a Salesman*, 47 Food & Drug L.J. at 311. In the years following World War II, the prescription drug industry experienced enormous growth. Charles J. Walsh, Alissa Pvrich, *FDA Efforts to Control the Flow of Information at Pharmaceutical Industry-Sponsored Medical Education Programs: A Regulatory Overdose*, 24 Seton Hall L. Rev. 1325, 1339 (1994). New drug products were introduced at a greater pace than in the past. *Id.* Drug company profits also rose substantially, and with increased profits came an increase in the promotion of prescription drug products. *Id.*

The 1962 Kefauver-Harris Amendments to the FDCA, also known as the Drug Efficacy Amendments, established the protectionist system of drug regulation exists today. *Id.* (citing 21 U.S.C. §§ 321, 331-32, 348, 351-53, 355, 357-60, 372, 274, 376, 381 (1970)). The amendments precluded the shipment in interstate commerce of any new drug that the FDA had not formally approved for use. With the advancement of these amendments, pharmaceutical companies were precluded from promoting drugs for off-label uses, or any uses that that not been approved by the FDA. *See* Michelle M. Mello, *Shifting Terrain in the Regulation of Off-Label Promotion of Pharmaceuticals*, 360 N. Engl. J. Med 1557, 1558 (2009); *see* 21 C.F.R. §§ 201.128, 202.1(e)(6). Consequently, the FDA must approve all marketing materials and placed restrictions on information PSRs could convey to physicians. Mello, 360 N. Engl. J. Med. at 1558. Now, if a PSR is the recipient of an unsolicited question concerning the off-label use of a drug, such inquiries, according to the FDA, must be handled by a pharmaceutical company's medical affairs office, *not* its sales force. *Id.* (emphasis added).

"By 1968, drug manufacturers employed approximately 20,000 persons in their sales forces." Walsh, Pvrich, 24 Seton Hall L. Rev. at 1339. "FDA Commissioner Alexander Schmidt observed in 1973 that the detail man 'really has been the major source of continuing education about therapeutics for the practicing physician.'" *Id.*

Prior to 1980, the FDA had imposed few restrictions concerning off-label promotion of drugs, particularly concerning the promotional mechanisms of disseminating scientific reprints and sponsorship of continuing medical education programs. *Id.* During the 1980's, Congressional concerns about off-label promotion grew, and hearings were held in 1990. *Id.* The hearings in 1990 resulted in the FDA publishing regulatory guidance concerning when continuing medical education ("CME") programs would be deemed to be improper off-label promotion, and it also issued warning letters to pharmaceutical companies concerning off-label promotion and the dissemination of clinical reprints. *Id.* at 1558-59.

In addition, in 1997, the FDA initiated a policy change to allow pharmaceutical companies to engage in direct-to-consumer ("DTC") advertising through newspapers, magazines, televisions, and the internet. Helm, 18 Fordham Intell. Prop. Media & Ent. L.J. at 148.

As pharmaceutical manufacturers have engaged in more assertive marketing tactics, the FDA has responded by exercising its regulatory authority over drug marketing and advertising. *Id.* at 151. The FDA's current authority to regulate the manufacture, sale and distribution of drugs includes extensive oversight over the promotional labeling and advertising claims made by pharmaceutical companies on behalf of approved drugs. *Id.* According to the FDA, a pharmaceutical company may promote a drug only for its approved purposes. *Id.* Any claim made in a promotional advertisement must be wholly consistent with the approved product labeling. *Id.*

Currently, the FDA regulates all dissemination of information about a pharmaceutical product. *Id.* at 151-52. It has established a regulatory system in which drug products cannot be promoted to anyone (including physicians), for any use, in the absence of labeling for the FDA-approved use. *Id.* at 151; 21 C.F.R. §§ 202, 203. This regulatory system has had a major impact on the job duties of PSRs, as anything that they convey to a healthcare provider must be pre-approved by the FDA, or else pharmaceutical companies risk civil and criminal exposure for the off-label promotion of products. Enforcement actions concerning off-label promotion may be brought pursuant to the FDCA or the False Claims Act. Mello, 360 N. Engl. J. Med. at 1561. Indeed, several companies, including GSK, have settled for millions of dollars with the FDA for the off-label promotion of products. *Id.* at 1562-63 (chart of companies that have settled cases concerning off-label promotion). Due to such pervasive regulation and liability risks, many companies require that PSRs of today adhere to scripted presentations. *See Novartis*, 611 F.3d at 145, 157; *Proctor & Gamble Pharma., Inc. v. Hoffman-*

LaRoche, Inc., 2006 WL 2588002, at *31 (S.D.N.Y. Sept. 6, 2006) (case in which GSK and other companies agreed that "sales representatives are trained to tell doctors only what is previously authorized. In other words, sales calls are not spontaneous, but are carefully scripted presentations"); *Zeneca v. Eli Lilly & Co.*, 1999 WL 509471, at *8 (S.D.N.Y. July 19, 1999) ("Eli Lilly provides its sales representatives with selling scripts or 'verbatims' that tell them what to say to doctors").

Accordingly, the substantial governmental regulatory changes during the past century have resulted in significant and material changes in the job duties of a PSR. The role of the PSR changed from one that involved wide latitude and actually selling drugs to purchasers (such as pharmacies) to a highly restricted one involving purely promotional efforts directed at physicians.

C. The Pharmaceutical Industry Has Changed The Role of PSRs

1. PhRMA's Description of the Role of Today's PSRs

By arguing that PSRs are exempt pursuant to the outside sales exemption, the pharmaceutical industry takes a position that is in direct contradiction to its description of PSRs in the *Code on Interactions with Healthcare Professionals*[8] ("PhRMA Code") and other publications by PhRMA. The members of PhRMA consistently refer to the role of PSRs and their interaction with healthcare providers as "marketing and promotion."

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[8] www.phrma.org/about/principles-guidelines/code-interactions-healthcare-professionals

See Pharmaceutical Marketing in Perspective: Its Value and Role as One of Many Factors Informing Prescribing[9] ("Perspective Publication"), PhRMA July 2008 at p. 1; *The Facts About Pharmaceutical Marketing & Promotion*[10] ("Facts Publication"), PhRMA July 2008 at p. 17 (describing PSR's sales and training as part the pharmaceutical industry's DTC budget). Notably, *not once* does the PhRMA Code refer to the interaction between PSRs and healthcare providers as "sales". *See* PhRMA Code at p. 2 ("this document focuses on the interactions with healthcare professionals that relate to the *marketing* of our products (emphasis added)"; p. 4 ("Interactions should be focused on *informing* healthcare professionals about products, providing scientific and educational *information*, and supporting medical education (emphasis added)."). As set forth below, the PhRMA Code has changed the duties of PSRs as they fulfill their informational role for the pharmaceutical industry.

2. The PhRMA Code Has Changed The Role Of PSRs

The PhRMA Code was established by the pharmaceutical industry to:

> [R]einforce our intention that our interactions with healthcare professionals are professional exchanges designed to benefit patients and to enhance the practice of medicine. The Code is based on the principle that a healthcare

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[9] www.phrma.org/sites/default/files/187/phrmamarketingbrochureinfluencesonprescribingfinal.pdf

[10] www.phrma.org/research/publications/profiles-reports

> professional's care of patients should be based, and should be perceived as being based, solely on each patient's medical needs and the healthcare professional's medical knowledge and experience.

PhRMA Code at p. 2. To satisfy its goal, the current PhRMA code, which took effect in 2009 and built upon the Code that took effect on July 1, 2002, establishes strict policies to which all PSRs must adhere, which include:

1. When providing meals to healthcare providers during an informational interaction, meals must be modest in cost and accompanied by a presentation of educational or scientific value. PhRMA Code at p. 4.

2. To ensure the appropriate focus on education and informational exchange and to avoid the appearance of impropriety, PSRs cannot provide entertainment or recreational items to any healthcare professional who is not a salaried employee of the company. *Id.* at p. 5.

3. PSRs are precluded from providing non-educational and non-practice related items to healthcare professionals. *Id.* at 11.

4. As PSRs play an important role in *delivering accurate, up to date information* to healthcare providers about approved indications, companies should ensure that all representatives receive training about applicable laws, regulations and industry codes, including the PhRMA Code. *Id.* at 14.

As discussed above, it is evident that the pharmaceutical industry itself has implemented its own voluntary restrictions on the duties of PSRs that have transformed the nature of their jobs. By doing so, the pharmaceutical industry has implicitly recognized the change in the role of PSRs from that of making "sales" to a strictly promotional and informational role, and the PhRMA Code was enacted to reflect that change and provide guidance on how companies should utilize PSRs to properly convey information to healthcare professionals.

3. Other Industry Publications Reflect the Changed Job Duties of Today's PSRs

The Facts Publication and Perspective Publication — which were published by the *pharmaceutical industry* — are additional evidence that the pharmaceutical industry acknowledges that PSRs do not sell and that PSRs in fact have limited, if any, influence on the prescribing habits of physicians. As the Perspective Publication provides, the pharmaceutical industry acknowledges that while PSRs add value to pharmaceutical *marketing and promotion by disseminating information*, other factors—such as formulary position on managed care plans and clinical studies—play a larger role than PSRs in determining which drug a patient ultimately receives. *See* Perspective Publication, at 4. Indeed, in a physician survey, in identifying sources that influenced prescribing habits, five-times as many physicians (55%) identified peer-reviewed literature, and three-times (35%) as many identified the patient's formulary, than those who identified information from pharmaceutical representatives (11%). *Id.* at 6.

Other sources further demonstrate that there are multiple factors that may influence a physician's decision to prescribe a drug, only one of which might be a PSR's presentation. *See Ironworkers Local Union 68 v. Astrazeneca Pharma., LP*, 634 F.3d 1352, 1362-63 (11th Cir. 2011); Declaration of Randolph V. Frankel ¶ 31, *IMS Health Inc. v. Ayotte*, No. 06-CV-280-PB, 2006 WL 4507573 (D. N.H. filed July 28, 2006).

In addition, the Perspective Publication concludes by noting that the interaction between PSR's and physicians — which it again characterizes as "marketing and promotion" — "plays an important role *in providing information*" to physicians about pharmaceutical products. *Id.* at 9 (emphasis added). Significantly, as indicated above, the Perspective Publication never refers to the interaction between a PSR and a health care provider as "selling" or "sales."

4. In SEC Filings, Many Drug Companies Have Reported That PSRs Don't Sell Pharmaceutical Drugs; They Only Promote Them

In the *Kuzinksi v. Schering* action, plaintiffs submitted excerpts from Schering's Form 10-K document that the Company filed with the United States Securities and Exchange Commission ("SEC") for the fiscal year that ended December 31, 2007. These publicly-filed excerpts further reflect the pharmaceutical industry's understanding that PSRs do not make sales of pharmaceutical drugs. The excerpts provided, under the header of *Marketing Activities and Competition* in the Form 10-K, the following:

> Schering-Plough, through its trained professional sales representatives, introduces

> and makes known its prescription drugs to physicians, pharmacists, hospitals, managed care organizations and buying groups. Schering-Plough sells prescription drugs to hospitals, certain managed care organizations, wholesale distributors and retail pharmacists. Schering-Plough also introduces and makes known its prescription products through advertising, direct mail advertising, the distribution of samples to physicians, and through television, radio, Internet, print and other advertising media.

(*See* Excerpts from Schering's 10-K filing with the SEC (Doc. No. 97-1), at Exhibit 1 at p. 18 of 230.)

This 10-K filing — a document that requires accurate and precise language — indicates that Schering's PSRs promote its products while other employees at Schering actually sell them. Indeed, in the very same 10-K filing, Schering states that, as a company, it sells its prescription drugs to hospitals, managed care organizations, wholesalers, and retail pharmacists — entities that Schering classifies as direct purchasers and with whom its PSRs do not interact. Schering utilizes the same language to describe the role of its PSRs as it uses to describe the role of its direct-to-consumer advertising — "introduces and makes known its prescription products." These excerpts from Schering's 10-K filing are yet another example of the pharmaceutical industry itself characterizing the role of PSRs as not involving the selling of drugs.

Other pharmaceutical manufacturers have similarly submitted SEC filings that distinguish between the manufacturer's sales of drugs to wholesalers, and the entirely different promotional duties of PSRs.[11]

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[11] Eli Lilly and Company, 2010 Annual Report, Form 10-K, p. 3 http://files.shareholder.com/downloads/LLY/1642776639x0x447905/6281D413-C258-488B-ADBE-B35289495F26/English.PDF

> Marketing: We sell most of our products worldwide. We adapt our marketing methods and product emphasis in various countries to meet local needs.
>
> Pharmaceuticals—United States
>
> In the United States, we distribute pharmaceutical products principally through independent wholesale distributors, with some sales directly to pharmacies. In 2010, 2009, and 2008, three wholesale distributors in the United States— AmerisourceBergen Corporation, McKesson Corporation, and Cardinal Health, Inc.— each accounted for between 12 percent and 17 percent of our worldwide consolidated net sales. No other distributor accounted for more than 10 percent of consolidated net sales in any of those years. We also sell pharmaceutical products directly to the United States government, but those sales are not material.
>
> We promote our major pharmaceutical products in the United States through sales representatives who call upon physicians and other health care professionals. We advertise in medical journals, distribute literature and samples of certain products to physicians, and exhibit at medical meetings. In addition, we advertise certain products directly to consumers in the United States and we maintain web sites with information about all our major products.

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Merck and Co., Inc.; Form 10-K filed with SEC on 2/28/11; p. 13 http://www.merck.com/investors/financials/form-10-k-2011.pdf

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> Distribution
>
> The Company sells its human health pharmaceutical products primarily to drug wholesalers and retailers, hospitals, government agencies and managed health care providers such as health maintenance organizations, pharmacy benefit managers and other institutions. Human health vaccines are sold primarily to physicians, wholesalers, physician distributors and government entities. The Company's professional representatives communicate the effectiveness, safety and value of the Company's pharmaceutical and vaccine products to health care professionals in private practice, group practices, hospitals and managed care organizations.

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Novartis Pharmaceutical Corporation also draws a sharp difference between PSRs' marketing duties and the company's actual sales of its drugs.

> Marketing and Sales: The Pharmaceutical Division serves customers with approximately 5,700 field force representatives in the US (including supervisors), and an additional 15,300 in the rest of the world. These trained representatives, where permitted by law, present the therapeutic and economic benefits of our products to physicians, pharmacists, hospitals, insurance groups and managed care organizations. *Although specific distribution patterns vary by country, Novartis generally sells its prescription drugs primarily to wholesale and retail drug distributors, hospitals, clinics, government agencies and managed healthcare providers. See* Novartis SEC Filing, "AG Form 20-F," at 43 (2009), http://access.edgar-online.com/DisplayFilingInfo.aspx?TabIndex=2&FilingID=6364690&companyid=85434&ppu=%252fE

5. Other Industries Have True Sales Positions

Industries other than the pharmaceutical business have employees called "sales representatives" who do what their job title suggests — they actually sell products. These non-drug industries believe that PSRs do not have a primary duty of "making sales." In a declaration submitted in support of her motion for summary judgment, Evavold stated in paragraph 21: "Other industries recognize that what Reps do is not 'sales.' For example, attached as Exhibit A are job postings for medical device sales that I found on www.medreps.com and www.directsalesrecruiting.com. On the job postings, the companies seeking medical device sales representatives specifically indicate that they will only accept applications from pharmaceutical representatives who have limited experience with pharmaceutical 'sales' because what Reps do is not selling."

Other PSRs who are currently litigants against pharmaceutical companies have remarked on the difference between their role as a PSR and other non-pharmaceutical-related sales jobs. For example, Anthony Coultrip, a named Plaintiff in the *Pfizer* action, submitted a supplemental declaration, document number 94-17 dated May 7, 2008, in which he described the difference between

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xpandedSearch.aspx%253fsite%253d0acade95-c20b-4c47-bebb-1dca89f15ab1%2526amp%253bsearchTypeID%253d1%253bname%253dNovartis*%2526amp%253bFormGroupID%253d4%2526amp%253bReceivedDate%253dLAST_12_MONTHS%253bfrom%253dquicksearch&type=convpdf.

(emphasis added).

a sales position at Cutera Incorporated and Pfizer at ¶ 4: "Unlike my job at Pfizer, I sell directly to physicians and hospitals. Also unlike my job at Pfizer, I have the ability to take orders for my product, enter into contracts with health care providers, negotiate prices and accept money for the purchase of the product I sell. My commission is directly related to the products that physicians purchase or lease from me."

Another PSR, who is a named Plaintiff in the *Schering* action, Shawn Jones, submitted at ¶ 4 of his declaration, June 16, 2008 (Doc. No. 95): "After I left Schering, I worked for Masimo Corporation selling medical equipment. Unlike the bonus I received at Schering, when I was at Masimo Corporation, I received a true commission. The commission was based on the number of devices I sold. The more I devices I sold, the more money I made. I would receive that commission regardless of the financial status of the company or how many devices other salespeople sold. Unlike my position with Schering, the harder I worked, the more commissions I would receive. Also, unlike my position with Schering, when I made a sales call for Masimo Corporation, customers would be able to purchase the product directly through me."

D. Employees in Other Industries With Similar Promotional Duties Will Be Adversely Impacted if the Pharmaceutical Industry's Arguments Are Upheld

Other industries in which nonexempt employees who, like PSRs, merely promote products that are sold by others will be adversely affected by a ruling that PSRs are exempt as outside salesmen. The arguments of Respondent and its *amici curiae* fail to acknowledge the possibility of this substantial prejudicial effect on thousands of nonexempt employees in other industries.

In this regard, the primary duty of today's PSR is essentially no different from that of the nonexempt promotional employee in other industries (*i.e.*, those who promote products or matters for which the sales are consummated by others). These include, for example, the college recruiter; the army recruiter; the charity solicitor; the organ donation promoter; the canvasser; the student promoter of magazine subscriptions, and the street-corner sandwich board bearer. *See Clements v. Serco, Inc.*, 530 F.3d 1224, 1227-28 (10th Cir. 2008) (civilian military recruiters who merely promoted military not within the outside salesperson exemption); *Wirtz v. Keystone Readers Services, Inc.*, 418 F.2d 249, 261 (5th Cir. 1969) (student magazine subscription promoter not exempt as outside salesmen because they promoted products sold by others); *Slow v. Prestige Merchandising Co., Inc.*, 2011 WL 4373516, at *1 (E.D.N.Y. Sept. 19, 2011) (worker employed as canvasser and canvass manager not exempt where she promoted products sold by others); *Burling v. Real Stone Source, LLC*, 2009 WL 1812785, at **3-7 (D. Idaho June 24, 2009) (sales representative for stone production company not exempt outside salesman where he promoted products sold by others); Opinion Letter from Wage and Hour Div., U.S. Dep't of Labor, 1998 DOLWH LEXIS 17, at **3, 7 (Feb. 19, 1998) (college recruiters who promoted school not exempt as outside salesmen where others that decided whether to make contractual offers were ones that made actual sales); Opinion Letter from Wage and Hour Div., U.S. Dep't of Labor, FLSA 2006-16, 2006 WL 1698305 (May 22, 2006) (solicitor of future charitable donations not exempt because "'selling the concept' of donating to a charity does not constitute 'sales' for the purposes of the outside sales exemption . . . the solicitors do not obtain orders or contracts for services or for use of . . . facilities for which a consideration will be paid"); Opinion Letter from Wage and Hour Div., U.S. Dep't of Labor, 1994 DOLWH LEXIS 65, at *3 (Aug. 19, 1994) (organ donation promoter not exempt because "[t]he selling of a concept does not constitute 'sales' within the meaning of the regulations"); 75 Fed. Reg. 28404, 28414 (May 20, 2010) ("exemption . . . for outside salespeople does not apply to individuals employed solely to wave signs or wear placards, sandwich boards, or costumes to attract potential customers as such promotion work is not performed in conjunction with sales actually made by those individuals").

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

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AMICUS
CURIAE
BRIEF

No. 11-204

In the
Supreme Court of the United States

MICHAEL SHANE
CHRISTOPHER ET AL.,

PETITIONERS,

v.

SMITHKLINE BEECHAM CORPORATION,
D/B/A GLAXOSMITHKLINE,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA (PhRMA) AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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March 26, 2012

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INTEREST OF *AMICUS CURIAE*[1]

The Pharmaceutical Research and Manufacturers of America ("PhRMA") is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies. PhRMA's mission is to advocate in support of public policies that encourage the discovery of life-saving and life-enhancing new medicines. PhRMA closely monitors legal issues that impact the pharmaceutical industry and has frequently participated in cases before this Court.

PhRMA has a particular interest in this case because whether pharmaceutical sales representatives ("PSRs") are exempt from overtime pay under the "outside sales" exemption of the Fair Labor Standards Act of 1938 ("FLSA" or "the Act"), 29 U.S.C. §§ 201 *et seq.*, is of critical importance to the pharmaceutical industry and the tens of thousands of PSRs it employs across the nation. Throughout the 70 years since the enactment of the FLSA, the settled understanding has been that PSRs, who are highly skilled, well-compensated sales professionals, are exempt from overtime pay. A ruling that PSRs are not exempt would expose PhRMA's members to the risk of staggering retrospective liability and could require them to restructure their sales operations in ways that would adversely affect not only PhRMA's members, but also the tens of thousands of PSRs they employ, the vast majority of whom who have never asked to be—and do not want to be—treated as hourly workers.

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[1] The parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than PhRMA and its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. This case turns on whether the job performed by PSRs comes within the FLSA's definition of "[s]ale" or "sell" in 29 U.S.C. § 203(k). That definition is explicitly broad and inclusive: "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." By providing examples of what a "sale" "includes," and by using examples that do *not* involve a transfer of title and extend beyond the term "sale" itself, Congress made clear that the definition was intended to be flexible and non-technical so that it could be applied across the spectrum of industries to myriad specific methods by which sales occur.

This statutory definition plainly encompasses PSRs throughout the pharmaceutical industry, whose job is to obtain the maximum allowable commitment from physicians to prescribe the PSRs' assigned products. Given the applicable legal and ethical constraints, a sale of a prescription drug involves different mechanics than sales in other industries, but the key customer is the physician, and that is why pharmaceutical companies hire large outside sales forces of PSRs to sell to physicians. Recognizing this reality is not a call for special treatment for the pharmaceutical industry, but rather for the common sense that Congress intended in fashioning § 203(k)'s explicitly practical definition.

II. PSRs' exempt status is of enormous practical importance to both pharmaceutical companies and PSRs themselves. Treating PSRs as non-exempt would require a major restructuring of the PSR position that would benefit no one. Like other outside salespersons, PSRs work with little direct supervision, manage their own flexible schedules, and generally receive substantial performance-based incentive compensation. These aspects of the position make the PSR job much sought-after and facilitate the recruitment of highly qualified candidates, but the same aspects are fundamentally incompatible with classification as an hourly employee. The FLSA's broad definition of sales clearly demonstrates that Congress would not have wanted technicalities about how sales occur in the pharmaceutical industry—due to regulatory and ethical requirements that are far afield from the worker-protection purposes of the FLSA—to make it impossible for the PSR position as we know it to exist, thereby hurting both pharmaceutical companies and PSRs.

III. A. Petitioners and the United States seek to avoid having this Court interpret § 203(k) for itself on the rationale that the Court should defer to the Department of Labor's regulations. Deferring to those regulations, however, does not advance the analysis, because the regulations simply incorporate the statutory definition and do not narrow it or purport to offer a different definition. The regulations relied on by the United States merely refer back to, and thus confirm, § 203(k)'s broad definition. If there were any doubt, 29 C.F.R. § 779.241 builds on the statute's flexible approach by emphasizing that "selling" includes any work that "in a practical sense is an essential part of consummating" a transaction. None of the regulations supports the Secretary's newly-minted rigid position that making sales requires a fully consummated transfer of title.

B. Nor can the Court resolve this case by extending "controlling" deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to the Secretary's *amicus*-brief pronouncement that PSRs do not make sales. Because the regulations merely parrot the statutory definition of sales, the Secretary's view about the proper result in this case cannot be understood as a genuine interpretation of the regulations. To the contrary, if the Secretary is interpreting anything, it is the *statutory* definition that the regulation expressly incorporates. But when an agency proffers a statutory interpretation in an *amicus* brief, without going through notice-and-comment rulemaking, it is not entitled to deference under either *Chevron* or *Auer*. In all events, even if the Secretary's *amicus*-brief view were regarded as an interpretation of the regulations, it still would not merit controlling deference because it upsets settled expectations by departing abruptly and without explanation from the Department's long-established flexible definition of sales.

ARGUMENT

I. THROUGHOUT THE PHARMACEUTICAL INDUSTRY, PSRs MAKE SALES WITHIN THE MEANING OF THE FLSA.

Congress provided in the FLSA that employees who are employed "in the capacity of outside salesman" are exempt from the Act's overtime requirements, and it authorized the Department of Labor to "define[] and delimit[]" the term "outside salesman." 29 U.S.C. § 213. Congress also included in the Act a definition of "[s]ale" or "sell" that is broad and inclusive: "'Sale' or 'sell' includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." 29 U.S.C. § 203(k).

Pursuant to its delegated authority from Congress to implement the outside-sales exemption, the Department promulgated a regulation that ties the definition of "outside salesman" to the Act's definition of "sale" by providing that to be eligible for the exemption, an employee must make "sales within the meaning of" § 203(k). 29 C.F.R. § 541.500 (a)(1). To determine whether petitioners are covered by that exemption, this Court therefore must construe the statutory definition of "sale." The statutory definition plainly encompasses what PSRs do.

PSRs are the pharmaceutical industry's "90,000-person sales force." Pet. App. 26a. Their sales efforts are directed toward physicians because a patient, the "ultimate user" of a prescription drug, cannot purchase that drug "without first obtaining a physician's authorization," *id.* at 3a, and so it is the physician who "selects the medication" that is purchased by or for the patient, *id.* at 26a. The PSR's goal is therefore to obtain a "non-binding commitment from the physician to prescribe the PSR's assigned product when medically appropriate." *Id.* at 27a. Regulations and ethical guidelines make this "the absolute maximum commitment" that a PSR can obtain from a physician. *Id.* In the context of the highly regulated pharmaceutical industry, physicians are the customers and PSRs' efforts to obtain these commitments from them constitute "making sales" within the meaning of the FLSA.

Congress crafted the FLSA to be flexible so that it could be sensibly applied in a wide variety of circumstances across diverse industries. *Cf. Walling v. A.H. Belo Corp.*, 316 U.S. 624, 634–35 (1942) (Congress eschewed "rigid definition[s]" in the FLSA "because the employment relationships to which the Act would apply were so various and unpredictable"). In keeping with that overarching goal, Congress provided a definition of "sale" or "sell" that is broad and explicitly open-ended. That statutory definition, which is expressly incorporated in the regulations defining the scope of the outside-sales exemption, easily encompasses the work of PSRs.

Congress provided that for purposes of the FLSA, "'[s]ale' or 'sell' *includes any sale*, exchange, contract to sell, consignment for sale, shipment for sale, *or other disposition*." 29 U.S.C. § 203(k) (emphases added). "Includes" is a "term of enlargement, and not of limitation," *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (quotation omitted). This is particularly true where, as in § 203, some definitional provisions use the word "mean" while others use "include," which makes it crystal clear in context that the former "enumerate and restrict" while the latter "enlarge and extend." *Am. Sur. Co. of N.Y. v. Marotta*, 287 U.S. 513, 517 (1933); *see Helvering v. Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934).

Moreover, by including "any sale" as just one of several types of transactions that fall within the definition, Congress clearly signaled that the Act's broad concept of sales is not limited by any narrower meaning the term "sale" might have in other contexts. This is confirmed by the strikingly open-ended phrase "or other disposition." *See* Pet. App. 28a. Petitioners contend that a "disposition" necessitates a transfer of title, Br. 25–26, but in fact, the meaning of "disposition" is far broader and encompasses diverse "arrangement[s]." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 361 (11th ed. 2008); *see* Steven I. Locke, *The Fair Labor Standards Act Exemptions and the Pharmaceuticals Industry: Are Sales Representatives Entitled to Overtime?*, 13 BARRY L. REV. 1, 25–26 (2009) (canvassing dictionary definitions).

The language of § 203(k) clearly reflects Congress's intent to adopt a definition of sales that was sufficiently flexible to accommodate the various ways in which sales are made in different industries. This broad and explicitly inclusive definition is the antithesis of the Department's narrow focus on a consummated transfer of title.[2]

PSRs make sales within this flexible, functional definition because they work to obtain the maximum legally and ethically permissible commitment from physicians to prescribe the PSRs' assigned products. The purchase and sale of a prescription drug is a complex transaction involving multiple parties, including the physician who prescribes the drug, the pharmacist who dispenses it, the insurance company that often pays for all or part of it, and the patient who consumes it. It is the physician, however, whose knowledge, training, and ethical responsibilities make him or her the "gatekeeper" whose decision whether to prescribe a particular drug, or not, is the key to determining whether the transaction will occur. *Baum v. AstraZeneca LP*, 605 F. Supp. 2d 669, 678 (W.D. Pa. 2009), *aff'd on other grounds*, 372 F. App'x 246 (3d Cir.), *cert. denied*, 131 S. Ct. 332 (2010); *see* Med. Prof'ls Br. 2 ("the prescribing decision requires a number of sophisticated, independent judgment calls that are left to the discretion of each individual physician").[3]

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[2] The Court should not, as one *amicus* brief suggests, "presume that Congress ... incorporated" any supposed common-law definition of "sales" or "salesman." NELA Br. 4–6. Rather, the Court "must follow" the "explicit definition" of "sale" that Congress provided in the statute, "even if it varies from ... ordinary meaning." *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000). Further, because the Department defined the exemption for "outside salesmen" by incorporating the statutorily defined term "sale" into that regulation, it is *Congress's* definition of that term that determines the scope of the exemption.

It is for this reason that PSRs' sales efforts are focused on one-on-one discussions with the physician, the critical decisionmaker and thus the effective "buyer" in the prescription drug market. "Without physicians, no drugs would ever be sold to patients. While physicians are not a formal link in the drug-company-to-patient supply or distribution chain, they are, in fact, the l[i]nchpins." *Yacoubian v. Ortho-McNeil Pharm., Inc.*, No. 07-127, 2009 WL 3326632, at *5 (C.D. Cal. Feb. 6, 2009), *appeal docketed*, No. 09-55229 (9th Cir. Feb. 13, 2009). And PSRs do not seek merely to persuade physicians of the benefits of their assigned products in a general way, but rather seek specifically to obtain the maximum possible commitment from the physicians to prescribe those products when medically appropriate. In the context of the highly regulated pharmaceutical industry, there is no doubt that this is making sales and that PSRs are employed "in the capacity of outside salesm[e]n." 29 U.S.C. § 213(a)(1); *see* Pet. App. 26a.

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[3] In their *amicus* brief, Drs. Brody and Curfman contend that the exchange between a PSR and a physician should not be viewed as a sale because the physician uses his or her "best professional judgment when making a prescribing decision." Med. Prof'ls Br. 1. PhRMA agrees with this description of the role and responsibility of the physician, but the *amici* doctors' conclusion that the physician's exercise of professional judgment means that the exchange cannot be a "sale" is a non-sequitur. Many goods and services are sold to sophisticated buyers who, like physicians, critically evaluate the information provided by salespersons. That PSRs are not "heavy-handed," but rather provide "value" primarily in their "information dispensing capacity," *id.* at 3, 7, does not mean that PSRs are not salespeople; it means that PSRs' sales techniques are appropriately adapted to the unique context of prescription medicines.

PSRs' status as the pharmaceutical industry's sales force is confirmed by the fact that, like petitioners in this case, PSRs throughout the industry bear many traditional indicia of salespersons. For example, pharmaceutical companies typically "advertise[] openings for [PSRs] as sales positions," *In re Novartis Wage & Hour Litig.*, 611 F.3d 141, 144 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011), and "recruit[] applicants who have prior sales experience" to fill those positions. Pet. App. 5a; *see Kuzinski v. Schering Corp.*, 604 F. Supp. 2d 385, 390 (D. Conn. 2009) ("advertisements [for PSR jobs] seek individuals with sales skills and experience"), *aff'd*, 384 F. App'x 17 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1567 (2011).

Once hired, PSRs receive extensive, ongoing training on "selling techniques." *Jirak v. Abbott Labs., Inc.*, 716 F. Supp. 2d 740, 742 (N.D. Ill. 2010), *appeal docketed*, No. 11-1980 (7th Cir. Apr. 28, 2011). Sales training programs for PSRs are similar to such programs in other industries, including such elements as "building interpersonal skills," Pet. App. 6a, and "role-playing to simulate future interactions with physicians," *Baum*, 605 F. Supp. 2d at 671. PSR training also focuses on the classic salesperson's art of "closing," which in the heavily regulated prescription drug market means "ask[ing] for a commitment from a physician to prescribe" the PSR's assigned products when appropriate. Pet. App. 6a; *see Schaefer-LaRose v. Eli Lilly & Co.*, 663

F. Supp. 2d 674, 678, 688 (S.D. Ind. 2009) (describing how Lilly trains PSRs "to ask for business on every call and to ask the physician to commit to prescribe Lilly products" (internal quotation marks omitted)), *appeal docketed*, No. 10-3855 (7th Cir. Dec. 14, 2010). PSRs throughout the pharmaceutical industry are "trained specifically in the art of conducting these delicate closing efforts." *Baum*, 605 F. Supp. 2d at 683.

Finally, pharmaceutical companies evaluate and compensate PSRs based on factors including their sales ability and results. *See, e.g.*, *Schaefer-LaRose*, 663 F. Supp. 2d at 687 (noting that plaintiff's "efforts were neither incidental to sales made by others nor performed only for the purpose of increasing Lilly's sales in general"); *In re Novartis Wage & Hour Litig.*, 593 F. Supp. 2d 637, 652 (S.D.N.Y. 2009) ("To the extent physicians write prescriptions for [Novartis] drugs, it is the [PSRs]—and not other [Novartis] employees—who obtain these prescriptions and who receive credit for them by means of incentive payments."), *rev'd*, 611 F.3d 141 (2d Cir. 2010); *Delgado v. Ortho-McNeil, Inc.*, No. 07-263, 2009 WL 2781525, at *5 (C.D. Cal. Feb. 6, 2009), *appeal docketed*, No. 09-55225 (9th Cir. Feb. 11, 2009). In all these respects, PSRs' jobs are indistinguishable from those of sales professionals in other industries.[4]

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[4] Contrary to petitioners' assertions, nothing in *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011), casts any doubt on PSRs' status as salespersons. Petitioners contend that *Sorrell* held that "the role of detailers is not to enter into a commercial transaction but *instead* to provide information about particular products." Pet'rs Br. 11 (emphasis added). But *Sorrell* held no

Moreover, many pharmaceutical companies use PSRs not only to sell prescription drugs that the patient obtains through a pharmacy, but also to sell physician-administered prescription drugs (such as vaccines and other injectable pharmaceuticals) or over-the-counter drugs. Because these products are not dispensed by a pharmacy, physicians may place orders with or take delivery from the PSRs. These activities would likely be considered "sales" even under petitioners' and the United States' narrow conception of that term, which simply highlights how artificially rigid that conception is. A PSR's job description does not change depending on which type of product he or she is assigned to sell, and indeed, some PSRs are assigned both types of products. It is impossible to imagine that Congress intended PSRs' status as salespersons to depend on which type of product they are selling at any given moment.

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such thing; petitioners' dichotomy between being a salesperson and providing scientific information is of their own making. Rather, this Court held that a state law restricting PSRs' use of data regarding a physician's prescribing history was unconstitutional even assuming that the burdened speech was properly deemed commercial. 131 S. Ct. at 2667, 2672. And PhRMA expressly acknowledged that the prohibited speech, while scientific and educational in nature, was designed to promote a commercial transaction and "undertaken with a commercial motive." PhRMA Br. 25, *Sorrell*, 131 S. Ct. 2652 (No. 10-779). More fundamentally, petitioners' dichotomy is false, as speech may be *both* entitled to full First Amendment protection *and* intended to induce sales. *See Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 795–96 (1988); *see also Sorrell*, 131 S. Ct. at 2665 ("While the burdened speech results from an economic motive, so too does a great deal of vital expression.").

The United States mistakenly suggests that the FLSA cannot take account of "industry-by-industry variations" in how sales are made. U.S. Br. 21; *see also* Pet'rs Br. 28. To the contrary, Congress made the definitions in the FLSA broad and flexible enough to account for the practical reality that the "precise contours of a 'sale' naturally differ across industries, markets, and even cultures." *Baum*, 605 F. Supp. 2d at 677. If Congress had wanted the FLSA to be applied robotically with no regard for real-world context, it would have drafted a very different statute and, in particular, a very different definition of "sale" or "sell." Contrary to the suggestion of petitioners and their *amici*, the pharmaceutical industry is not asking for special treatment, but rather for "common sense in applying [the] broad statutory language [of the FLSA] to a specific case and controversy." *Id.* The Act requires no less.[5]

As a last resort, petitioners assert that "exemptions from overtime must be construed narrowly." Pet'rs Br. 11 (citing *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945)).

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[5] Recognizing that the FLSA's common-sense definition includes PSRs' efforts would not, as one *amicus* brief suggests, necessitate treating as exempt every employee who "promot[es] products or services with the end goal of increasing sales." NELA Br. 18. NELA greatly exaggerates the slipperiness of this particular slope, as the employees it discusses, unlike PSRs, generally do not obtain "the absolute maximum commitment" that they can legally and ethically obtain from the key customers in their industry. Pet. App. 27a; *see* NELA Br. 18–21.

Even if this supposed canon of construction were well-founded, it would not apply here, as the Department's decision to define the scope of the outside-sales exemption by reference to the statutory definition of sales means that the provision that must be construed is § 203(k). That provision is not an exemption, but a general definitional provision that applies in many contexts within the FLSA—including the Act's coverage provisions, which the United States says must be *broadly* construed, U.S. Br. 26. Section 203(k), however, is one provision with one meaning; it cannot mean one thing when incorporated into an exemption and another thing when incorporated into a coverage provision. *See Clark v. Martinez*, 543 U.S. 371, 378 (2005); *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context").[6]

II. REQUIRING COMPANIES TO PAY PSRs OVERTIME WOULD HAVE SEVERE ADVERSE CONSEQUENCES FOR THE INDUSTRY AND PSRs THEMSELVES.

Pharmaceutical companies have structured their sales operations in reliance on their uniform understanding that PSRs are exempt from the FLSA's overtime requirements. If PSRs are not exempt, companies would also be forced to undertake major restructuring that would be difficult and costly both for the industry and for PSRs themselves, whose jobs may be rendered far less attractive.

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[6] In any event, the foundations of this supposed canon are highly questionable. *See Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 508 (7th Cir. 2007) (Posner, J.) (the canon's "underlying principle is mysterious," as it does not explain why "one provision in a statute [should] take precedence over another").

A. If pharmaceutical companies are required to pay PSRs overtime, the reclassification of the PSR position will be costly and disruptive, because key aspects of PSRs' jobs as they are currently structured are fundamentally incompatible with treating PSRs as hourly employees.

First, PSRs operate with little direct supervision. As one court explained, PSRs "spend the great majority of their time out of the office. They are not generally subject to direct supervision while they go about their business. They do not report to work first thing in the morning and clock in. They have a large degree of autonomy, which would make it more difficult to make them accountable for every minute of their day." *Delgado*, 2009 WL 2781525, at *5. Pharmaceutical companies ordinarily give PSRs wide freedom to structure their schedules as they see fit, which includes identifying the best time and place to meet with a particular doctor. This was exemplified by one plaintiff who "worked without direct hour-to-hour, day-by-day supervision" and was never "told ... how many hours she should work in any given week." *Schaefer-LaRose*, 663 F. Supp. 2d at 679, 688.

Second, most PSRs are eligible to receive substantial performance-based incentive compensation. As noted, many pharmaceutical companies establish sales goals, track the number of prescriptions issued by physicians, and use sales figures as a factor in determining PSRs' incentive compensation. *See id.* at 686–88. Thus, "[t]he object of [PSRs'] harder work" is not "to garner overtime," but rather "to generate sales." *Delgado*, 2009 WL 2781525, at *3. Thanks in part to their ability to earn incentive compensation, many, if not most, PSRs are extremely well-compensated.

The fundamental incompatibility of the outside salesperson's job with the FLSA's overtime pay requirement means that reclassifying PSRs would require radically transforming their jobs. Simply put, "[i]t is impractical to make [PSRs] hourly employees due to the lack of supervision and structure in their jobs, and because they generate additional incentive income ... instead of overtime." *Yacoubian*, 2009 WL 3326632, at *4; *see Baum*, 605 F. Supp. 2d at 686 (PSRs "are professionals whose absence from the office makes it impossible ... to carefully supervise their hours" and who "have sufficient leverage to negotiate excellent pay packages"). There is no reason to think that Congress would have wanted technicalities about how sales occur in the pharmaceutical industry, due to regulatory and ethical requirements having nothing to do with the worker-protection purposes of the FLSA, to make it impossible for the PSR position as we know it to exist.[7]

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[7] If PSRs must be reclassified as hourly employees, the cost and disruption associated with overhauling pharmaceutical companies' PSR-centered sales operations prospectively would be on top of the staggering retrospective liability the industry would face. In the past six years, "plaintiffs' lawyers have filed nearly 100 collective and class action lawsuits" against

B. Not only would reclassifying PSRs impose major costs on pharmaceutical companies, it would also have a severe impact on the lives of tens of thousands of PSRs nationwide. The vast majority of PSRs have never asked to be classified as hourly workers under the FLSA, and for good reason: Most PSRs enjoy the benefits associated with their exempt classification. It is telling in this respect that so many of the named plaintiffs in FLSA actions against pharmaceutical companies are *former*, not current, PSRs. *See* Knight & Marks, *Overtime Exemption Litigation Targets the Pharmaceutical Industry*, at 1, 8 (noting that "the opt-in rate for pharmaceutical collective actions under the FLSA has been low—typically in the range of 4–6%" and "typically fewer than 10% of those who join these cases are actively employed by the company they sue").

There is no doubt that most PSRs appreciate the ability to operate with minimal day-to-day

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pharmaceutical companies under the FLSA and analogous state laws. Brent D. Knight & Michelle G. Marks, *Overtime Exemption Litigation Targets the Pharmaceutical Industry*, CLASS ACTION WATCH, Sept. 2011, at 1, 6. If PSRs are not subject to the outside-sales exemption, the industry faces billions of dollars of potential liability from suits like these. Like respondent, PhRMA believes that if PSRs are not outside salespersons, they are nonetheless covered by the "administrative" or other exemptions, *see* Resp. Br. 60 n.24; *see, e.g., Smith v. Johnson & Johnson*, 593 F.3d 280, 285 (3d Cir. 2010), but at a minimum, holding that PSRs are not subject to the outside-sales exemption would guarantee years of costly litigation that would divert resources from the industry's core mission of developing new medicines.

supervision, set their own schedules, and manage their territories. Declarations submitted by PSRs in similar cases in support of pharmaceutical companies' classification of them as exempt employees attest to this fact and demonstrate that many PSRs regard this aspect of their job as critical to their success. *See, e.g.*, Decl. of Julie Montagne at ¶16, *Evancho v. Sanofi-Aventis U.S., Inc.*, No. 3:07-2266 (D.N.J. Sept. 7, 2007), ECF No. 161-2 ("I believe that if Sales Professionals were hourly employees, then we would lack the freedom necessary to make independent decisions; our success in sales and career growth would be very limited."); Decl. of Jamie Demboski at ¶ 11, *Evancho*, No. 3:07-2266 (D.N.J. Sept. 7, 2007), ECF No. 161-11 ("It would be extremely difficult and impractical for me to keep track of the hours I work and I do not think that I would be successful as a sales person if I was relegated to a schedule or required to keep a time card."). Yet the autonomy and flexibility prized by many current PSRs will have to be curtailed significantly if pharmaceutical companies must treat PSRs as non-exempt and pay them as hourly employees.

Likewise, many PSRs value the industry's traditional, incentive-based compensation structure. Not only does this compensation regime enable many successful PSRs to earn highly competitive salaries, often reaching six figures; it also enhances their well-being by contributing to their sense of ownership and investment in their work. *See, e.g.*, Decl. of Judy Kennedy at ¶5, *Evancho*, No. 3:07-2266 (D.N.J. June 18, 2007), ECF No. 127-27 ("I like to think that I 'own my territory.' ... The harder I work, and the more calls I make, the more profitable my business is and the greater my compensation. ... Like other sales jobs, the chance to get out of the business what I put into it is what motivates me."); Decl. of Marta Villahermosa at ¶12, *Brody v. AstraZeneca Pharm., LP*, No. 2:06-6862 (C.D. Cal. Apr. 25, 2008), ECF No. 119 ("I believe that treating my territory as my own business has made me successful. ... In my territory, I am the CEO ...."). However, if pharmaceutical companies are forced to reclassify PSRs and pay them overtime, this incentive-based compensation structure will have to give way to a more rigid, hours-based system.

It is doubtful that current PSRs—especially skilled and motivated ones—would be better off. Current PSRs are rightly disturbed by these efforts by a relative handful of mostly former employees to upend a compensation system that continues to work well for tens of thousands of PSRs. *See, e.g.*, Decl. of Jane Mandel at ¶10, *Evancho*, No. 3:07-2266 (D.N.J. June 18, 2007), ECF No. 127-23 ("The concept of receiving overtime in our jobs is absurd. I don't see how any of us will gain anything if we move to this format. It is all very upsetting to me.").[8]

This case ultimately turns on Congress' intent, and it cannot plausibly be argued that PSRs are the type of workers whom Congress sought to protect.

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[8] Moreover, PSRs play an important role in disseminating scientific information to physicians, and changing the PSR job from one involving a high degree of flexibility with rewards for individual motivation to one with rigid working hours and fixed compensation could make it harder for PhRMA's members to attract high-quality applicants for these important jobs.

PSRs are well-educated, highly trained individuals with jobs that most would envy for their attractive features and high pay. The FLSA, in contrast, was intended to protect "the most vulnerable workers, who lacked the bargaining power to negotiate a fair wage or reasonable work hours with their employers." 73 Fed. Reg. 67,934, 67,987 (Nov. 17, 2008). The simple reality is that petitioners are seeking to use a strained reading of a statute that was never intended to apply to their positions to obtain a windfall at the expense of the pharmaceutical industry and tens of thousands of current and prospective PSRs. As one court has noted, "[n]either semantics nor overly narrow statutory constructions should be allowed to devalue [PSRs] by forcing upon them uniform and limiting labor protections" that were never intended to apply to their positions. *Baum*, 605 F. Supp. 2d at 686.

III. PETITIONERS' AND THE UNITED STATES' ARGUMENTS FOR IGNORING THE FLSA'S BROAD DEFINITION LACK MERIT.

Petitioners and the United States assert that the Court is compelled for two reasons to accept the Secretary of Labor's view that PSRs are not covered, instead of the Court being free—indeed compelled—to interpret the statutory definition of "sale" for itself.

First, petitioners and the United States argue that the Court should defer to regulations that, they assert, unambiguously demonstrate that PSRs do not make sales. That argument fails because the regulations do not support the Secretary's narrow interpretation, but rather simply refer back to—and confirm the breadth of—the statutory definition. The Department has never promulgated a regulation that purports to give "sale" a different or narrower meaning for purposes of the outside-sales exemption than the meaning given that term by Congress in § 203(k). Thus, the regulations do not alter the need for the Court to determine whether PSRs make sales within the meaning of the statute.

Second, if *Chevron* deference to the Department's regulations will not work, petitioners and the United States fall back to seeking *Auer* deference to the Secretary's view, announced for the first time in an *ad hoc* 2009 *amicus* brief, that a sale requires a consummated transfer of title. The premise of *Auer* deference is absent here, however, because the Secretary's view cannot plausibly be described as an interpretation of the Department's regulations. As already explained, the regulations merely incorporate and refer back to the statutory definition of "sale." Repeating that statutory definition in a regulation does not empower the Department to dictate its desired bottom-line result in pending private litigation via an *amicus* brief—especially an *amicus* brief that unexpectedly breaks with the Department's longstanding flexible view of the statutory definition of "sale."

A. The Regulations Confirm that PSRs Make Sales Within the Act's Broad Definition.

Petitioners and the United States argue that regulations promulgated by the Department of Labor radically constrict the Act's broad, flexible definition of sales and mandate the Secretary's newly-minted focus on the transfer of title. This notion that the plain language of the regulations dictates the result desired by petitioners and the United States does not bear the slightest scrutiny. To the contrary, the regulations confirm and incorporate the practical approach dictated by the statute. Petitioners' and the United States' plea for *Chevron* deference to the regulations gets them nowhere because the regulations do not purport to answer the question presented with any more specificity or in any different way than the statute itself does.

1. Petitioners and the United States rely on several regulations, but the Department has never issued any regulation that purports to limit "sales" as used in the outside-salesman exemption in a way that could support its position in this case. Instead, the regulations at issue all refer back to the broad statutory definition of "sale" in § 203(k), which they incorporate either expressly or by reference. None of these regulations narrows the statutory definition in any way that would exclude PSRs.

First, the general "outside salesman" regulation, 29 C.F.R. § 541.500 (a)(1), states only that an employee whose "primary duty" consists of "making sales within the meaning of [§ 203(k)]" is an exempt outside salesperson. This is a prototypical parroting regulation, as it explicitly refers back to the statute's definition of sales and does not attempt to elaborate on or clarify that definition. *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). This cross-reference back to § 203(k) in the very section defining the scope of the "outside salesman" exemption sets the theme for the regulations that follow, all of which similarly refer back, explicitly or implicitly, to the statutory definition.

Second, the making-sales regulation, 29 C.F.R. § 541.501(b), states only that "[s]ales within the meaning of section 3(k) of the Act *include* the transfer of title to tangible property and, in certain cases, of tangible and valuable evidences of intangible property" (emphasis added). By its plain terms, this regulation provides *examples* of "sales" but does not define or delimit that term. *See Burgess*, 553 U.S. at 131 n.3. If there were any doubt about whether this first sentence of § 541.501(b) limits the Act's definition, the second sentence confirms that it does not by reciting the full text of § 203(k) verbatim. This deliberate parroting makes it obvious that this regulation was intended to adopt, and not to narrow or vary, the statutory definition. The United States is thus simply mistaken when it tells the Court that § 541.501(b) provides "that an employee sells goods *only* if he transfers title to those goods to the buyer." U.S. Br. 14 (emphasis added).

Third, petitioners and the United States rely heavily on the promotion-work regulation, 29 C.F.R. § 541.503, but it does not purport to define "sale" either. It states only that whether an employee's "promotional work" is covered by the outside-sales exemption depends on whether that work is "incidental to and in conjunction with the employee's own outside sales." The regulation does not offer any guidance about what constitutes "the employee's own outside sales," and it does not draw a bright line between promotion and sales. Instead, it requires that one refer back to § 203(k)'s definition of sales in order to understand the boundaries of exempt sales work and non-exempt promotional work.

In all events, it is clear as a historical matter that the promotion-work regulation was not intended to exclude employees who, like PSRs, are the only sales force in their industry. The discussion of promotional work in the Department's 1940 report focused on the idea that "promotion men" were not covered because they merely "pav[ed] the way for salesmen." *Stein Report*, *supra*, at 46. This is echoed in the regulations' emphasis on the need for an exempt employee to make his or her "own sales." 29 C.F.R. § 541.503(b); *see id.* § 541.500(b). It therefore bears emphasis that PSRs do not "pave the way" for anyone. They are, as the Ninth Circuit recognized, "pharmaceutical manufacturers['] ... 90,000-person sales force." Pet. App. 26a.

The United States contends that "GSK has a [separate] sales force that takes and processes orders from retailers," U.S. Br. 15, but it conspicuously fails to cite any support for that statement. In reality, while pharmaceutical companies have systems in place to maintain the inventories of wholesalers and retailers of prescription drugs (consisting mainly of periodic restocking pursuant to a general contract), these systems are largely ministerial and require only a few employees to administer them. For example, one of PhRMA's members employs more than 2,000 PSRs but fewer than ten employees who are responsible for processing orders from retailers and wholesalers, a ratio that is typical of how the industry is structured. These employees are not hired for sales experience and are not trained in sales techniques.

The United States fails entirely to justify its counter-intuitive position that these few employees who restock inventory pursuant to existing contracts are the salespeople, rather than the industry's far more numerous "sales representatives" who use their sales experience and training to persuade physicians to write prescriptions authorizing the purchase of a drug. Petitioners' and the United States' narrow focus on the transfer of title ignores the essence of what it means to make a sale in this industry. The transfer of title is not the key; a pharmaceutical company's contract with a wholesaler may specify that title transfers at the point of delivery, but that does not make the delivery-truck driver a salesperson. Instead, the real sales in the pharmaceutical industry result from the interaction between PSRs and the key customers, the physicians who must be persuaded to prescribe the company's drug when appropriate and thus authorize its purchase. The notion that tens of thousands of PSRs are not salespersons because they are "paving the way" for the minuscule number of employees who, without any sales training, take and process restocking orders is self-refuting.

2. Were there any doubt that the regulations confirm the broad statutory definition and do not adopt the Secretary's new inflexible approach, that doubt would be resolved by 29 C.F.R. § 779.241. Petitioners and the United States try to sweep this provision under the rug, but it clearly refutes their position by providing that an employee "will be considered to be 'selling'" if the employee "performs any work that, *in a practical sense* is an *essential part* of consummating the 'sale'" (emphases added).

With its explicit focus on the "practical sense" in which the employee's work contributes to a consummated sale and its explicit provision that an employee may be engaged in "selling" even if he or she does not directly consummate the sale, § 779.241 plainly belies the United States' position that PSRs do not "sell" because they do not transfer title.

Petitioners do not even mention § 779.241, and the United States dismisses it on the ground that it interprets the statute's enterprise-coverage provision, not the outside-sales exemption. U.S. Br. 26–27; *see* 29 U.S.C. §§ 203(s), 207(a)(1) (FLSA covers, *inter alia*, an enterprise "that has employees ... selling ... goods or materials" in commerce). The United States' argument ignores the fact that § 779.241 interprets § 203(k), the very statutory provision at issue here, and § 203(k) defines "sale" or "sell" for purposes of *both* the enterprise-coverage provisions *and* the outside-sales exemption. The text of § 779.241 confirms this by cross-referencing "[t]he statutory definition of the term 'sale' or 'sell'" as quoted in 29 C.F.R. § 779.15, which in turn both quotes and explicitly refers to § 203(k).

Because it interprets § 203(k), § 779.241 is directly relevant to this case, and the United States cannot escape the fact that § 779.241 refutes the Department's new rigid view. Section 779.241 is also consistent with the Department's longstanding interpretation, dating back to 1940, that the outside-sales exemption covers employees who "*in some sense* make a sale." 69 Fed. Reg. 22,122, 22,162 (Apr. 23, 2004) (quoting U.S. Dep't of Labor, Wage & Hour Div., *"Executive, Administrative, Professional ... Outside Salesman" Redefined: Report and*

Recommendations of the Presiding Officer at Hearings Preliminary to Redefinition at 46 (Oct. 10, 1940) (hereinafter "*Stein Report*")) (emphasis added).[9]

In sum, the regulations relied on by petitioners and the United States do not contradict, but rather incorporate and confirm, the flexible, practical definition of sales that is dictated by § 203(k). The regulations provide no support whatsoever for petitioners' and the United States' position that sales within the meaning of the outside-sales exemption are narrowly limited to transactions that consummate a transfer of title. The Court should therefore reject the untenable contention that the regulations "unambiguously resolve this case in petitioners' favor." Pet'rs Br. 31.

B. The Secretary's Newly-Minted Interpretation Is Not Entitled to *Auer* Deference.

The Court should also reject petitioners' fallback request for deference to the Secretary's *amicus*-brief pronouncement that PSRs do not make sales within the meaning of the FLSA. When an agency interprets an ambiguous statute not through notice-and-comment rulemaking, but in an *ad hoc* amicus brief, the agency's interpretation is not entitled to *Chevron* deference. *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000). Petitioners do not disagree, but assert that the Secretary's view is nonetheless entitled to "controlling" deference under *Auer* because it interprets the Department's own regulations defining the scope of the outside-sales exemption. That assertion is wrong for at least two reasons.

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[9] As explained above, *see supra* at 14, the United States' attempt to dismiss § 779.241 is fundamentally misguided because it seeks to create two competing versions of § 203(k)'s definition of "sale" or "sell." To give § 203(k) different meanings when incorporated in different contexts "would be to invent a statute rather than interpret one." *Clark*, 543 U.S. at 378.

1. This Court has held that *Auer* deference does not apply when the regulation that the agency claims to be interpreting "does little more than restate," "summarize," "paraphrase," or otherwise "parrot[]" statutory language. *Gonzales*, 546 U.S. at 257. As the Court explained, *Auer* deference comes into play only when an agency offers its views on the meaning of regulatory language that *the agency itself* selected "using its expertise and experience." *Id.* When regulatory language parrots statutory language, the agency is not genuinely interpreting its own words; "the question … is not the meaning of the regulation but the meaning of the statute." *Id.* And an agency's interpretation of a statute, of course, carries no "special authority" when it is announced in an *amicus* brief, *id.*; rather, an agency must employ notice-and-comment rulemaking or comparable procedures to be eligible for *Chevron* deference for its statutory interpretations. *See Christensen*, 529 U.S. at 587.

As explained above, the regulations on which the United States relies are prototypical parroting regulations. Section 541.500(a)(1) refers to "sales within the meaning of" the statute; § 541.501(b) quotes the statutory language verbatim and gives examples of what it "includes"; and § 541.503 describes non-exempt promotion work by reference to "sales" without further defining that statutory term. Because all these regulations fall back on the statutory definition, the Secretary's view regarding whether PSRs make sales is, at best, her view of what the *statute* means.

The Secretary may be able to obtain deference—under *Chevron*, not *Auer*—to her view of what the statute means, but only if she goes through notice-and-comment rulemaking and announces her view in a form that carries the force of law. *See Christensen*, 529 U.S. at 587. But the Secretary's interpretation of the *statute* is obviously not eligible for *Auer* deference. Because Congress, not the Secretary, wrote the words at issue, the Secretary can claim no special insight into what the author of those words meant. Equally fundamentally, the Secretary cannot insist on deference to her policy judgments where she has avoided the process required to trigger deference to such judgments under *Chevron*. It would be perverse to afford "controlling deference" under *Auer* to a view announced in an *amicus* brief that unquestionably would not be eligible for deference under *Chevron* where the regulation that the agency purports to interpret does little more than track the statutory language.

2. The Secretary's new position that a sale requires a consummated transaction was announced for the first time in an *amicus* brief in 2009. As the Ninth Circuit recognized, that position "transform[ed] what since [the early days of the FLSA had] been recognized as a multi-factor review

of an employee's functions into a single, stagnant inquiry." Pet. App. 35a. Even if one indulges the fiction that that position meaningfully constitutes an interpretation of regulatory language written by the Department—as opposed to an interpretation of statutory language that, as such, is by definition not eligible for *Auer* deference—the Secretary's new position is an about-face from the flexible, functional understanding of sales that the Department has espoused for decades. This new position upsets the reasonable expectations of the pharmaceutical industry, which has structured its sales operations in reliance on the Department's practical, non-technical approach. For that reason as well, the Secretary's interpretation does not merit controlling *Auer* deference.

This Court has stated on many occasions that "an agency's interpretation of a ... regulation that conflicts with a prior interpretation is entitled to considerably less deference than a consistently held agency view." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)) (internal quotation marks omitted); *see also Mead*, 533 U.S. at 228; *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993); *Watt v. Alaska*, 451 U.S. 259, 273 (1981). Likewise, the Court has warned that a new interpretation does not merit any deference when it results in "unfair surprise." *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170–71 (2007). And in recent decisions, the Court has continued to treat consistency as an important factor in the decision whether to afford *Auer* deference. *See Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2263–65 (2011); *Chase Bank USA, N.A. v. McCoy*, 131 S. Ct. 871, 881 (2011).

Consistency is important for at least two reasons. For one, an unexplained departure from an agency's longstanding interpretation of its regulation "is likely to reflect the agency's reassessment of wise policy rather than a reassessment of what the agency itself originally meant," *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005), and an agency's naked policy preferences do not merit controlling *Auer* deference.[10] Moreover, regulated entities structure their affairs on the assumption that an agency will not suddenly and without explanation abandon its long-held views. An agency may not "under the guise of interpreting a regulation, ... create *de facto* a new regulation" and thereby circumvent the required notice and public participation. *Christensen*, 529 U.S. at 588.

Here, the Secretary's new interpretation of sales, announced not through notice-and-comment rulemaking but by lobbing an unsolicited *amicus* brief into a private lawsuit, upends decades of settled expectations for the entire pharmaceutical industry and tens of thousands of PSRs and threatens the industry with massive retrospective liability. The Secretary did not even acknowledge, much less successfully explain away, the conflict between her current position and the Department's longstanding view that an employee will be deemed to "make sales" if the employee makes a sale "in some sense," 69 Fed. Reg. at 22,162 (quoting *Stein Report* at 46), "in any way participates in the sale," or "performs any work that, in a practical sense is an essential part of consummating the 'sale,'" 29 C.F.R. § 779.241. As the Ninth Circuit properly recognized, courts should not afford any deference—let alone "controlling" deference—to such an "about-face regulation, expressed only in ad hoc *amicus* filings," that departs from "decades of DOL nonfeasance and the consistent message to employers that a salesman is someone who 'in some sense' sells." Pet. App. 35a.[11]

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[10] The Department has made no secret of its intent to use uninvited *amicus* briefs to advance its current assessment of wise policy. Its website solicits requests for *amicus* briefs in order to provide "stronger overtime protection for America's workers." Overtime Security *Amicus* Program, http://www.dol.gov/sol/541amicus.htm.

As Justice Scalia pointed out in urging the Court to revisit *Auer*, extending *Auer* deference uncritically risks "promot[ing] arbitrary government" by "encourag[ing] the agency to enact vague rules which give it the power ... to do what it pleases." *Talk Am.*, 131 S. Ct. at 2266 (concurring opinion). This case exemplifies the dangerous incentives that can be created by misapplying *Auer*. If an agency can get "controlling deference" to its desired position by simply repeating statutory language in a regulation and then announcing a surprising new interpretation of that "regulatory" language in the midst of pending private litigation, agencies can hardly be expected to resist the temptation to proceed in that manner. But regulations that do little more than repeat statutory language do not provide the clarity and predictability that regulations are supposed to provide; the APA's rulemaking requirement is intended to force agencies to promulgate meaningful rules, not parroting regulations that merely set the stage for the agency to announce—and dictate—its desired outcome in the context of a private lawsuit. *See Thomas Jefferson Univ.*, 512 U.S. at 525 (Thomas, J., dissenting) ("agency rules should be clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law"). The Court should not encourage agencies to avoid or minimize the rulemaking process in favor of an ambush-by-*amicus*-brief approach to regulation.[12]

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[11] One *amicus* brief attempts to cast doubt on whether the pharmaceutical industry was unfairly surprised by the Secretary's new position by suggesting that the PSR position has changed since its inception. *See* Pharm. Rep. Br. 3 (suggesting that the Secretary "analyzed these changed duties, not the PSRs of long ago"). Tellingly, however, the *amici* do not assert that any relevant changes were at all recent and focus instead on changes that took place between the 1930s and 1960s. *See id.* at 14–20; *see also id.* at 19 ("the modern drug industry came into being after World War II"). Pharmaceutical companies reasonably expected that the Secretary would afford notice and opportunity for comment before announcing a new interpretation of "sales" that went against a half-century's worth of settled expectations. Indeed, "no pharmaceutical company has ever requested an interpretation on [this] issue from DOL" (*id.* at 9 n.7) precisely because until a few short years ago, the exempt status of PSRs was regarded as obvious by all concerned.

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[12] If the Court concludes that *Auer* requires deference under the circumstances of this case, PhRMA joins respondent in urging the Court to overrule *Auer* to the extent it requires deference to agency interpretations announced in *amicus* briefs in private litigation. *See* Resp. Br. 51–57. The Court need not

Indeed, the United States' brief in this case demonstrates the dangers that follow when agencies bypass notice-and-comment rulemaking and instead attempt to use *amicus* briefs to dictate outcomes in individual cases. While the United States at times suggests that its position amounts to a bright-line rule requiring a consummated transfer of title, it muddies the waters with qualifying statements. Thus, the United States asserts that "the Department has interpreted" the requirement that an outside salesperson make sales "in some sense" "flexibly to encompass the various ways in which salespeople can obtain a commitment to buy," U.S. Br. 20–21, and it claims sensitivity to "the modern reality that salesmen may make sales without executing written contracts or orders," *id.* at 33. Yet the Secretary's position in this case reflects no such sensitivity. It is evident that what the United States really wants is for the Secretary to be able to insist on a rigid consummated-transfer-of-title requirement *for PSRs*, while retaining the freedom to adopt a different and more "flexibl[e]" approach in other cases. But allowing an agency to pick winners and losers on a case-by-case basis is anathema to the purposes for which Congress enacted the APA.[13]

For all these reasons, the Court should not afford *Auer* deference to the Secretary's *amicus* brief. The Court's task is to decide whether the FLSA's

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reach that question, however, as the Secretary's position does not merit *Auer* deference under existing precedent.

[13] This muddying of the waters also belies the United States' contention that its approach has the virtue of being clear and easily administrable. *See* U.S. Br. 18–22.

definition of sales is sufficiently broad to encompass PSRs. The Secretary's *amicus*-brief view has no legitimate claim to bind the Court or to tip the scales; it merits consideration "only to the extent it is persuasive," *Gonzales*, 546 U.S. at 269, and it is not.

CONCLUSION

The Court should affirm the judgment below.

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March 26, 2012

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No. 11-204

IN THE
Supreme Court of the United States

MICHAEL SHANE CHRISTOPHER AND
FRANK BUCHANAN,
Petitioners,
v.
SMITHKLINE BEECHAM, CORP.,
D/B/A GLAXOSMITHKLINE
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION, ALLIED EDUCATIONAL FOUNDATION, AND THE CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amici curiae address the following issue only:

Whether deference is owed to the Secretary of Labor's interpretation of the Fair Labor Standards Act's exemption for outside sales employees and related regulations.

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INTERESTS OF *AMICI CURIAE*[1]

The Washington Legal Foundation (WLF) is a public-interest, law and policy center with supporters in all 50 states. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and accountable government. To that end, WLF routinely litigates in cases to ensure that undue deference is not accorded to governmental agencies. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001); *Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817 (D.C. Cir. 2004). WLF also litigates from time to time to ensure that the important notice-and-comment protections of the Administrative Procedure Act are not improperly circumvented. *See, e.g., Prevor v. FDA*, No. 1:11-cv-1187 (RMC) (D. D.C. Jan. 9, 2012).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual Cato Supreme Court Review, and files *amicus* briefs. The present case centrally concerns Cato because it implicates the important legal limits that apply to powerful administrative agencies.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties to this dispute have consented to the filing of this brief, and letters of consent have been lodged with the Court.

In its brief, Respondent persuasively demonstrates the myriad reasons why treating pharmaceutical sales representatives as exempt from the overtime pay requirements of the Fair Labor Standards Act is consistent with both the text and purpose of the Act, as well as with the rationale behind the "outside sales" exemption. *Amici* will not repeat those points here.

Amici write separately to emphasize that allowing regulatory agencies to freely change their interpretations of regulations and statutes, without the formal protections of notice-and-comment rulemaking, threatens to significantly undercut the predictability that has long been a hallmark of our common law system. *Amici* fear that if administrative agencies come to believe that formal rulemaking procedures are too cumbersome or inconvenient to follow, and are instead permitted to disrupt settled expectations under the pretense of merely "reinterpreting" existing regulations, an important safeguard for our representative system of government will be lost.

Amici are also concerned about the enormous upheaval that the Department's new interpretation of "outside sales" will have on legitimate reliance interests in the pharmaceutical industry—among employers *and* employees alike. Such concern is especially warranted where, as here, an agency's contradictory interpretation creates an unfair surprise for the affected stakeholders who had come to rely on that agency's earlier acquiescence for well over half a century.

STATEMENT OF THE CASE

At issue is whether pharmaceutical sales representatives are exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, *et seq.* In answering that question, the Ninth Circuit rightly accorded no deference to the Department of Labor's novel interpretation of the FLSA's outside sales exemption, an interpretation that abruptly contradicts the Department's own regulatory and interpretative guidance to the contrary for over seventy years. *See* Pet. App. at 21a-24a.

Enacted in 1938, the FLSA imposes several minimum labor standards on employers, including a statutory overtime pay requirement for employees who work in excess of forty hours per week. *See* 29 U.S.C. § 207(a)(1). Among the many exceptions to this overtime pay requirement, the FLSA specifically exempts "any employee employed in a bona fide executive, administrative, or professional capacity . . . or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor])." 29 U.S.C. § 213(a)(1). As the statute indicates, because Congress did not otherwise define the term, proper interpretation of "outside salesman" is informed by implementing regulations issued by the Secretary of Labor.

As early as 1940, the Department of Labor's regulations implementing the outside sales exemption emphasized the broad, flexible approach Congress took in defining "sales" within the meaning of section 3(k) of the FLSA. *See* 29 U.S.C. § 203(k) (defining "sale" so as to include "any sale, exchange, contract to sell, consignment for sale, *or other disposition*") (emphasis added). Some thirty years later, in 1970, the Department continued this flexible understanding of "sales" by announcing that "if the employee performs *any* work that, in a practical sense is an essential *part* of consummating the 'sale' of the particular goods, he will be considered to be 'selling' the goods." 29 C.F.R. § 779.241 (1970) (emphasis added). And as recently as 2004, the Department's rulemaking reinforced the understanding that the FLSA's outside sales exemption applies so long as an employee "*in some sense* make[s] a sale." *Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004) (emphasis added).

Petitioners Michael Christopher and Frank Buchanan were employed as pharmaceutical sales reps for GlaxoSmithKline (GSK), one of the world's leading research-based pharmaceutical and healthcare companies. Pet. App. at 2a. As pharmaceutical sales reps, Petitioners worked outside of GSK's offices and spent most of their time visiting physicians located within their assigned geographic territories. *Id.* at 4a. During such visits, Petitioners were tasked with delivering accurate information to physicians about GSK's products, providing physicians with samples of GSK's products, and encouraging physicians to prescribe, when appropriate, GSK's products over competing products. *Id.* On a daily basis, over 90,000 pharmaceutical sales reps call on physicians "for the purpose of driving greater sales." *Id.* at 28a.

After the conclusion of their employment with GSK, Petitioners filed a putative class action in the U.S. District Court for the District of Arizona, claiming that GSK had improperly classified them as exempt from the FLSA's overtime pay provision. *Id.* at 38a. Specifically, Petitioners argued that their overtime work was not exempted by the FLSA because they did not actually "sell" within the meaning of that term. *Id.* On the basis of that theory, Petitioners challenged GSK's alleged practice of requiring overtime work without paying additional overtime compensation in violation of the FLSA's statutory overtime pay requirement under 29 U.S.C. § 207(a)(1). For its part, GSK maintained that Petitioners were exempt under several longstanding interpretations of the "outside sales" exemption of the FLSA. *Id.* The parties cross moved for summary judgment.

Holding that pharmaceutical sales reps "unmistakably fit within the terms and the spirit of the exemption," the district court granted GSK's motion for summary judgment. *Id.* at 46a. Because both the FLSA and the Department of Labor's formal rules define the word "sale" "somewhat loosely" and go "beyond a constricted, traditional sense" of the word, the district court "decline[d] to adopt a hyper-technical construction" that would "run[] counter to the purpose of the [FLSA]." *Id.*

Petitioners unsuccessfully moved the district court to alter or amend its judgment on the grounds that the court had failed to give "controlling deference" to an *amicus curiae* brief filed by the Department of Labor in another case, *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). In that brief, the Department claimed that an employee sells goods *only* if he or she actually "transfers title" to those goods to a buyer. Otherwise, an employee who does not "transfer title" does not actually consummate a sales transaction and is thus not covered by the FLSA's "outside sales" exemption. That view, however, represented an abrupt departure from the Department's longstanding interpretation of the term "sales." The district court denied the motion, concluding that the Department's "absurd" interpretation was not only "inconsistent with the statutory language and its prior pronouncements, but . . . defies common sense." Pet. App. at 51a-52a.

Petitioners appealed to the U.S. Court of Appeals for the Ninth Circuit. In support of Petitioners, the Secretary of Labor filed an *amicus curiae* brief substantially similar to the one filed earlier in *Novartis*. On the question of whether deference—of the kind accorded in *Auer v. Robbins*, 519 U.S. 452 (1997)—should be accorded to the Secretary's newfound interpretation of the FLSA's overtime pay exemption, the Ninth Circuit concluded that deference is not warranted where an agency "has elected merely to paraphrase the statutory language." Pet. App. at 21a. The panel criticized the Labor Secretary's new interpretation as "plainly erroneous and inconsistent with her own regulations and practices," having essentially "transform[ed] what since [the early days of the FLSA had] been recognized as a multi-factor review of an employee's functions into a single, stagnant inquiry." *Id.* at 24a, 35a. The Court of Appeals further explained that such an "about-face regulation, expressed only in ad hoc *amicus* filings, [was] not enough to overcome decades of [Department of Labor] nonfeasance and the consistent message to employers that a salesman is someone who 'in some sense' sells." *Id.*

Refusing to defer to the Department of Labor's "about-face regulation," *id.* at 35a, the Ninth Circuit affirmed the district court's grant of summary judgment. In doing so, the panel relied on the FLSA and its implementing regulations to affirm the "common sense understanding" that pharmaceutical sales reps are covered by the "outside sales" exemption. *Id.* at 26a-28a.

The Court of Appeals denied rehearing en banc. *Id.* at 53a.

SUMMARY OF ARGUMENT

This case raises important issues about the limits of agency deference and the need to maintain appropriate checks on unpredictable and disruptive agency actions. Whatever else *Auer v. Robbins* may be said to require, it has never been understood to permit an agency, under the guise of reinterpreting a regulation, to effectively create an entirely new regulation. But that is precisely what both Petitioners and the Department of Labor ask this Court to allow in this case.

Even a cursory reading of the Department's *amicus* brief reveals that the Secretary is not engaged in an effort to provide clarity to an arguably ambiguous regulation—one of the chief justifications for deference under *Auer*. Rather, the Department's newfound construction of what constitutes a "sale" under the FLSA represents an abrupt and unexpected departure from that agency's longstanding position—a position that had been adopted and reinforced by much more formal and rigorous means than the mere drafting of an *amicus curiae* brief. But as the appeals court below rightly concluded, to defer to the Secretary's new interpretation under such circumstances would be to eviscerate the protections of the Administrative Procedures Act and its notice-and-comment provisions.

Thus, even if the Department's new, more constrictive definition of "sales" were a plausible interpretation of the statutory and regulatory language, the APA dictates that the Department may not adopt that interpretation without first complying with notice-and-comment rulemaking.

Those protections ensure that an administrative agency will be bound not only by the laws adopted by Congress but also by its own internal rules, unless and until that agency takes appropriate steps to change those rules—including providing affected stakeholders notice of the proposed changes and a meaningful opportunity to comment.

Auer deferred to the agency only after first determining that there was sufficient reason to believe that the views expressed in the agency's brief were reliable—that the brief gave no indication that the interpretation did not reflect the agency's "fair and considered judgment" on the matter in question. That is not the case here, where the agency appears at best to be engaging in an after-the-fact effort to justify its new litigating position and policy preference. Such an abrupt and unexpected departure cannot be said to be a "fair and considered judgment" under *Auer* and does not merit deference, much less "controlling deference," by this Court.

That is why, when deciding questions of deference, this Court has long looked to whether an agency's interpretation is consistent with that agency's earlier pronouncements. This is especially true where an agency's contradictory interpretation creates an "unfair surprise" for the affected stakeholders who, in this case, had come to rely on that agency's earlier interpretation for well over half a century. Not only would the Department's new interpretation of "sales" require a monumental restructuring of the pharmaceutical industry, it would also have a devastating impact on pharmaceutical sales employees themselves. And where, as here, an agency's sudden change in in its own regulatory position creates an "unfair surprise" on the affected stakeholders, that abrupt change constitutes a valid reason for disregarding the new interpretation altogether.

ARGUMENT

I. AGENCIES SHOULD NOT BE PERMITTED TO USE *AUER* DEFERENCE TO CIRCUMVENT THE IMPORTANT PROTECTIONS OF THE ADMINISTRATIVE PROCEDURE ACT

The Department of Labor claims that its narrow understanding of the term "sales", as manifest in an ad hoc *amicus curiae* brief, is entitled to "controlling" deference by this Court. Not so. Simply put, the law does not permit an agency to regulate by *amicus* brief. Whatever else *Auer v. Robbins*, 519 U.S. 452 (1997), may be said to require, it has never been understood to "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation." *Christensen v. Harris Cnty.*, 529 U.S. 576 (2000). Yet that is precisely what both the Department and Petitioners ask this Court to sanction in this case. Rather than initiate formal rulemaking to invite comment from stakeholders and further evaluate prospective changes to the definition of "sales," the Department merely filed an *amicus* brief announcing its new litigating position. As Justice Scalia warned only last Term in *Talk America v. Michigan Bell Telephone Co.*, 131 S. Ct. 2254, 2266 (2011), allowing an agency to both promulgate its own rules as well as interpret them "frustrates the notice and predictability purposes of rulemaking, and promotes arbitrary government."

When the Department of Labor first promulgated regulations implementing the outside sales exemption in 1940, it gave the term "outside sales" its most natural, straightforward interpretation, emphasizing the broad, flexible approach Congress took in defining "sale." *See* 29 U.S.C. § 203(k) (defining "sale" so as to include "any sale, exchange, contract to sell, consignment for sale, or other disposition") (emphasis added). Some thirty years later, in 1970, the Department continued this flexible understanding of "sale" by announcing that "if the employee performs *any* work that, in a practical sense is an essential *part* of consummating the 'sale' of the particular goods, he will be considered to be 'selling' the goods." 29 C.F.R. § 779.241 (1970) (emphasis added). And as recently as 2004, the Department's rulemaking reinforced the understanding that the FLSA's outside sales exemption applies so long as an employee "*in some sense* make[s] a sale." *See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees*, 69 Fed. Reg. 22122, 22162 (Apr. 23, 2004) (emphasis added).

Nevertheless, the Department has now abandoned that longstanding view and adopted, in the form of an ad hoc *amicus* brief, a more restrictive and narrow definition of "sales." Of course, nothing in the regulatory history suggests that the Department had based its regulations on an idiosyncratic definition of the word "sales." Nor is there anything in the Secretary's *amicus* filings to suggest that the Department is changing its policy because, after a careful examination of the language and history of the FLSA's outside sales exemption and the regulations implementing it, the Department has suddenly discovered that its previous interpretations woefully misrepresented Congressional intent. Rather, the Secretary's discussion of the outside sales exemption appears at best to be an after-the-fact effort to justify the Department's new litigating position and policy preference. Such an unexplained departure by an agency from its own longstanding interpretation of its regulations "is likely to reflect the agency's reassessment of wise policy rather than a reassessment of what the agency itself originally meant." *Dismas Charities, Inc. v. U.S. Dep't of Justice*, 401 F.3d 666, 682 (6th Cir. 2005). But an agency's policy views are not entitled to deference under *Auer*, nor should they be.

Even a casual reading of the Department's *amicus* brief makes clear that this is not an effort by the Secretary to provide clarity to an arguably ambiguous statute and regulation—one of the chief justifications for deference under *Auer*. Rather, the Department's newfound construction of what constitutes a "sale" under the FLSA represents an abrupt and unexpected departure from that agency's longstanding position—a position that had been adopted and reinforced by much more formal and rigorous means than the mere drafting of an *amicus curiae* brief. But, as the appeals court below rightly concluded, to defer to the Secretary's new interpretation under such circumstances would be to "sanction bypassing of the Administrative Procedure Act and notice and comment rulemaking." Pet. App.

at 24a. (citing *Christensen*, 529 U.S. at 576).

It is true that Congress, in enacting the FLSA in 1938, provided that the meaning of the term "outside sales" should be informed by implementing regulations promulgated by the Secretary of Labor. But that was not Congress's final word on the matter; for only eight years later, in 1946, Congress also enacted the Administrative Procedure Act (APA), 5 U.S.C. § 500 *et seq.*, which requires that all federal agencies provide notice to, and invite comment from, the affected stakeholders before formulating regulations. *See* 5 U.S.C. § 553 (mandating notice, comment, and consideration in agency rulemaking). Importantly, that notice-and-comment requirement applies to all "repeals" as well as "amendments." *See* 5 U.S.C. § 551(5).

Congress, then, acting through the APA, has sought to guard against arbitrary and capricious regulation by requiring that an agency's modification of its prior interpretation of a regulation may be accomplished only pursuant to the APA's notice-and-comment procedures. "Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking." *Paralyzed Veterans of Am. v. D.C. Arena, L.P.*, 117 F.3d 579, 586 (D.C. Cir 1997); *Shell Offshore, Inc. v. Babitt*, 238 F.3d 622, 629 (5th Cir. 2001) ("[T]he APA requires an agency to provide an opportunity for notice and comment before substantially altering a well established regulatory interpretation."). Unless an agency's modification of its prior interpretation of a formal regulation is subject to equally formal rulemaking requirements, "the agency could evade its notice and comment obligation by 'modifying' a substantive rule that was promulgated by notice and comment rulemaking." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94-95 (D.C. Cir. 1997) (quoting *Paralyzed Veterans of Am.*, 117 F.3d at 586).

Thus, even if the Department's new, more constrictive definition were a plausible interpretation of the statutory and regulatory language, the APA dictates that the Department may not adopt that interpretation without first complying with notice-and-comment rulemaking. "To allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine those APA requirements." *Paralyzed Veterans of Am.*, 117 F.3d at 586. That is why this Court has emphasized that APA rulemaking is required whenever an agency interpretation "adopt[s] a new position inconsistent with . . . existing regulations." *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

Indeed, this Court has refused to defer to an agency's *amicus* brief for the very reason that such informal interpretations (e.g., interpretations, such as those contained in *amicus* briefs, made outside the strictures of the APA) "lack the force of law." *Christensen*, 529 U.S. at 587. In that same vein, this Court held in *Long Island Care at Home, Ltd. v. Coke*, 55 U.S. 158, 170-71 (2007), that deference to the Department of Labor's views on the "domestic service" exemption to the FLSA's minimum wage requirements was not vitiated by the Department's change in position, since the agency had taken "recourse to notice-and-comment rulemaking in an attempt to codify its new interpretation."

This Court has also held that "[w]hen Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'" *CFTC v. Schor*, 478 U.S. 833, 846 (1986) (quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974)). Despite numerous opportunities to do so, Congress never acted to "correct" the Department's 70-year regulatory interpretation of the FLSA's "outside sales" exemption, which had been in effect since the time of the statute's enactment. That it chose not do so should be regarded as a deliberate policy choice, not as a deferral to the Department of Labor that it should feel free to impose a contrary policy instead. *See, e.g., Leary v. United States*, 395 U.S. 6, 25 (1969) ("[A] long-standing, contemporaneous construction of a statute by the administering agencies is entitled to great weight.") (internal quotation marks omitted).

In *Wyeth v. Levine*, 555 U.S. 555 (2009), this Court considered whether to accord deference to the Food and Drug Administration's (FDA) interpretation of the scope of its own preemption authority. Even though the FDA provided a formal notice of proposed rulemaking, it chose not to seek comment on the scope of permissible preemption. *Wyeth*, 555 U.S. at 1201. When the FDA ultimately promulgated a final rule that "articulated a sweeping position on the [FDA's] preemptive effect in the regulatory preamble," this Court refused to give those pronouncements deference in light of the FDA's "procedural failure," which made those pronouncements "inherently suspect." *Id.* The same result should obtain here.

Ultimately, this case presents an issue that is far broader than the fate of one industry and its efforts to prevent the Department of Labor from unilaterally overhauling the FLSA. As the size of the administrative state continues to grow, it is vitally important that stakeholders continue to have a meaningful opportunity to participate in the operation of their government. The protections of the APA are an important part of that effort. They ensure that administrative agencies will be bound not only by the laws adopted by Congress but also by their own internal rules, unless and until the agencies take appropriate steps to change those rules—including providing affected citizens notice of the proposed changes and a meaningful opportunity to comment.

But if administrative agencies come to believe that formal rulemaking procedures are too cumbersome or inconvenient to follow (as the Department of Labor apparently has), and are instead permitted to disrupt settled expectations under the pretense of merely "reinterpreting" existing regulations, an important safeguard of our representative system of government will be lost. Only this Court can ensure that agencies produce rules and interpretations of those rules that are sufficiently "clear and definite so that affected parties will have adequate notice concerning the agency's understanding of the law." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 525 (1994)

(Thomas, J., dissenting).

II. THE DEPARTMENT'S ABRUBT CHANGE IN HOW IT INTERPRETS ITS OWN REGULATIONS IMPLEMENTING THE FLSA'S "OUTSIDE SALES" EXEMPTION CONSTITUTES AN "UNFAIR SURPRISE" THAT IS UNDESERVING OF DEFERENCE

The pragmatic view that pharmaceutical sales reps are properly exempted from the FLSA's overtime pay provisions held sway for over 70 years, that is, until October 2009, when the Secretary of Labor suddenly abandoned that view in an *amicus* brief in *In re Novartis Wage & Hour Litig.*, 611 F.3d 141 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1568 (2011). In that brief, the Secretary opined that an employee sells goods *only* if he actually "transfers title" to those goods to a buyer. Otherwise, according to the Secretary, an employee who does not "transfer title" does not actually consummate a sales transaction and is thus not covered by the FLSA's "outside sales" exemption. The Secretary subsequently doubled down on that novel interpretation in her *amicus* filing in this case. Such an abrupt and unexpected departure from longstanding positions, however, does not merit deference, much less "controlling deference," by this Court.

"[D]eferring to an agency's interpretation of its own rule encourages the agency to enact vague rules which give it the power, in future adjudications, to do what it pleases." *Talk America*, 131 S. Ct. at 2266 (Scalia, J., concurring). Although this Court in *Auer* deferred to an agency's *amicus* brief "in the circumstances of [that] case," 519 U.S. at 462, it did *not* create a blanket rule requiring deference to every such brief that purports to interpret a regulation. Rather, *Auer* deferred to the agency only after first determining that there was sufficient reason to believe that the views expressed in the agency's brief were reliable—in other words, that the brief gave "no reason to suspect that the interpretation [did] not reflect the agency's fair and considered judgment on the matter in question." *Id.* That is not the case here.

Under *Auer*, an agency's interpretation of an ambiguous regulation is sometimes entitled to deference because it is presumed that the agency is best situated to interpret its own words. But an agency cannot properly claim to be "interpreting" a regulation when it is in effect *changing* that regulation. Where, as here, an agency's *amicus* brief drastically deviates from that agency's own longstanding views, that brief cannot be said to be a "fair and considered judgment" under *Auer*. This is especially true where that agency's contradictory interpretation creates an unfair surprise for the affected stakeholders who, in this case, had come to rely on that agency's earlier interpretation for well over half a century.

That is why, when deciding questions of deference, this Court has long looked to whether an agency's interpretation is consistent with that agency's own earlier pronouncements. *See, e.g., Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) ("[T]he consistency of an agency's position is a factor in assessing the weight that position is due.");

Pauley v. BethEnergy Mines, 501 U.S. 680, 698 (1991) ("As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views."); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-213 (1988) (refusing to defer to an agency's interpretation that was "contrary to [its] narrow view . . . advocated in past cases"); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 446 n.30 (1987) (stating that an "agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held view") (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)).

Many lower courts have similarly held that *Auer* deference is available only when the agency's "position is not inconsistent with [its] prior statements and actions regarding the disputed regulation." *Drake v. FAA*, 291 F.3d 59, 67 (D.C. Cir. 2002). They accord such deference only when an agency's interpretation of its regulation is "constant and unchanging." *U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977, 986 (11th Cir. 2004). *See also Taylor v. Progress Energy, Inc.*, 493 F.3d 454, 461 (4th Cir. 2007) (declining to defer to the Department of Labor's regulatory interpretation in an *amicus* brief because it was "inconsistent with what the [Department] said it intended the regulation to mean at the time it was promulgated").

Concomitantly, an agency's "fair and considered judgment" is one that is in harmony with that agency's prior interpretations. *See, e.g., U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1016 n.15 (D.C.

Cir. 2002) (whether an agency's interpretation is "fair and considered" hinges on whether the agency has "ever adopted a different interpretation of the regulation or contradicted its position on appeal") (internal quotations omitted). Indeed, as Judge Richard Posner has observed, while it may be "possible for an entire industry to be in violation of the Fair Labor Standards Act for a long time without the Labor Department noticing," the "more plausible hypothesis is that the . . . industry has been left alone" because it was fully compliant. *Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510-11 (7th Cir. 2007). Here, the Department's 70-year acquiescence in the pharmaceutical industry's exempt classification of its outside sales reps only further confirms the validity of the Department's former, expansive understanding of "sales."

Like all regulated entities, the pharmaceutical industry structures its affairs in reliance on the assumption that regulatory agencies will not arbitrarily and without explanation abandon their long-held interpretative views of fixed statutory and regulatory language. Yet it was not until 2009 that the Department of Labor first announced that pharmaceutical sales reps are ineligible for the FLSA's "outside sales" exemption for the idiosyncratic reason that they do not actually "transfer title" in the course of their outside sales duties. Such an abrupt change in policy, if accorded deference by this Court, will require a seismic shift in the structure of the outside sales force in the pharmaceutical industry—an industry that employs more than 90,000 outside sales reps each year. But, as the appeals court below rightly concluded, courts should not accord deference to an agency's "about-face regulation, expressed only in ad hoc *amicus* filings," which in this case depart from "decades of [agency] nonfeasance and the consistent message to employers that a salesman is someone who 'in some sense' sells." Pet. App. at 35a.

Not only would the Department's new interpretation of "sales" require a monumental restructuring of the pharmaceutical industry, it would also have a devastating impact on pharmaceutical sales *employees* themselves. Indeed, Petitioners hardly speak for all pharmaceutical sales reps, most of whom greatly value the autonomy and flexibility their position affords them. Like other outside sales professionals, pharmaceutical reps work with very little direct supervision, manage their own schedules, and receive generous incentive-based compensation based on their performance.

As exempt employees, pharmaceutical sales reps enjoy the independence that comes with being "off the clock." As Carol Maasz, an outside sales rep for Abbott Laboratories, explained in another lawsuit concerning the scope of the FLSA's outside sales exemption:

> One of my favorite things about my job is the flexibility it provides. As long as I accomplish my goals, I can arrange my appointments at institutions in a manner that is convenient for me. That is, I do not need to report to my manager, or to anyone else, if I need to run a personal errand during the day.

Declaration of Carol Maasz, *Jirak v. Abbott Laboratories*, No. 07-cv-3626 (N.D. Ill. Mar. 6, 2008), at ¶ 12. This view echoes another made in a similar setting by AnnTherese Mulryan, an outside sales rep for sanofi-aventis, who expressed her displeasure with litigious attempts to alter her pay structure:

> I took this job knowing full well that it was an exempt position and that I would not receive overtime pay. I believe that I am compensated appropriately. I appreciate the flexibility that comes with an exempt position and I have no interest in seeing the compensation arrangement changed. Further, I am bothered by the fact that a handful of mostly former employees can challenge a compensation system that works well for thousands of current employees.

Declaration of AnneTherese Mulryan, *Evancho v. sanofi-aventis U.S. Inc.*, No. 07-cv-2266 (D. N.J. June 18, 2007), at ¶ 5. *Amici* would respectfully submit that these views, rather than those of Petitioners, more accurately represent those of the over 90,000 pharmaceutical sales reps employed throughout the country.

But if the Department's new interpretation of "outside sales" is given deference by this Court, it would effectively eliminate the most desirable aspects of the pharmaceutical sales rep's position: supervisory independence, a flexible work schedule, the ability to earn a high salary, and a favorable work-life balance. After all, a sudden shift by pharmaceutical firms in their classification of outside sales reps from exempt to non-exempt would almost certainly result in a more structured and regimented work schedule, closer supervision, monitoring on a daily basis, and a loss of the ability to perform key job tasks at times most convenient for the employee. Moreover, it is likely that pharmaceutical sales reps would stand to lose their incentive-based compensation, which strives to reward the efforts of highly motivated and skilled sales professionals.

The Department of Labor's sudden change in interpreting its own regulation creates an "unfair surprise" on the affected stakeholders in the pharmaceutical industry and constitutes a valid reason for disregarding that new interpretation altogether. *See Long Island Care at Home, Ltd.*, 55 U.S. at 170-71.

CONCLUSION

For the foregoing reasons, the Court should affirm the Ninth Circuit's holding and refuse to defer to the Secretary of Labor's newfound interpretation of the FLSA's outside sales exemption.

Respectfully submitted,

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